THE INSTITUTIONS OF THE LAW OF Scotland.

By Sir *GEORGE MACKENZIE* of *Rosehaugh*, His Majesty's Advocat.

The Third Edition Corrected, with an Alphabetical Table of hard Words.

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Sr William Baird of Newbraith Bart

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TO THE

Earl of *MIDLETON*,

My Lord,

THE Natural way of Learning all Arts and Sciences, is to know, First, the Terms used in them, and the Principles upon which they are founded, with the Origins of the one, and the Reasons of the other. A Collection of these Terms and Principles is in Law called *Institutions*; And the Natural and easie way of Writing these, is by going from the first Principle to a second, and from that to a third: The admir'd Method of *Euclid* in his Elements, though much neglected by all, who have written *Institutions of Law*; in which, not only many things necessary are inserted, as almost all

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all the third Book of *Juſtinians Inſtitutions*; the Differences betwixt the *Sabiniani* and *Proculiani*, &c. Many Fundamental Titles are omitted. as all the matter of *Reſtitutions*: And many things are taught in the firſt Book, which cannot be underſtood till the fourth be read.

I have therefore in theſe my *Inſtitutions* treated of nothing ſave Terms & Principles, leaving nothing out that is neceſſary, and inſerting nothing that is contraverted; in all which I have proceeded, building always one Principle upon another; and expreſſing every thing in the Terms of the *Civil Law*, or in the Stile of Ours reſpectively; ſo that if any Man underſtand fully this *Little Book*; Natural Reaſon, and Thinking, will eaſily ſupply much of what is diffuſed, through Our many Volums of Trea-

Treatiſes, and Deciſions; Whereas tho ſtudying thoſe, would not in many years give a true Idea of Our Law; and does rather diſtract than inſtruct. And I have often obſerved, that moe *Lawyers* are ignorant for not underſtanding the firſt Principles, than for not having read many Books; As it is not much ryding, but the ryding in the known road, which brings a Man to his Lodging ſoon, and ſecurely.

My Lord, You obſerv'd very juſtly to me, that *Inſtitutions* are a *Grammar*; and therefore, (which is a great encouragement to all Readers of *Inſtitutions*,) they who underſtand the *Inſtitutions* of any one Nation, will ſoon learn the Law of any other: For though Terms, Forms, and Cuſtoms, differ; yet the great Principles of Juſtice and Equity are the ſame in all Nations. I ſend mine therefore

fore to your Lordſhip, not becauſe you need them, but that you may judge, if my *Inſtitutions* will be able to juſtifie your Parallel; Nor find I greater reaſon for changing my Patron in this Second Edition, than for changing the Principles laid down in the *Inſtitutions*, which I formerly preſented to you.

Nec Phœbo gratior ulla eſt;
Quam ſibi quæ Vari *præſcripſit pagina Nomen.*

The

Advertiſement.

THe Author having conſider-ed, that the firſt Impreſſion was Printed by a blotted Copie in write, and that ſome Notes upon papers a-part, had either fallen by, or were miſplaced, to which he had not leaſure to advert; Becauſe the Book was Printed in time of Seſſion; and when the Author was likewiſe much diverted by publick Imployment. He therefore thought it neceſſar, to give this ſecond Edition (the firſt being now quite ſpent) in which he has employed his laſt Care in Correcting this Impreſſion, wherein ſeveral things are Corrected, and many neceſſar things Added.

THE

Edinburgh, March 18. 1684.

IT is ordered by the Lords of His Majeſties moſt honourable Privy Council, That none ſhall Re-print, or Import into this Kingdom, the Book intituled, *The Inſtitutions of the Law of SCOTLAND*, by Sir *George Mackenzie* of *Roſehaugh*, His Majeſty's Advocat, for the ſpace of Nineteen Years, after the date hereof, without the Conſent of the Author; under the pain of Confiſcation of the whole Copies, and further Puniſhment as the Council ſhall think fit. Extracted by me

Pat. Menzies, Cls. Sti. Cli.

The which Act of Council, with all the Clauſes therein contained: The ſaid Lord Advocat doth hereby Aſſign in Favours of *Thomas Broun*, his Heirs or Aſſigneys. *G. M.*

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THE

THE INSTITUTIONS Of the LAW of SCOTLAND.

BOOK I.

TITLE I.

Of LAWS in General.

JUSTICE, *is a constant and perpetual Will, and Inclination to give every Man what is due to him.* Justice.

LAW, is the *Science* which teacheth us to do *Justice.* Law.

This Law, in a large acceptation, is divided into the Law *of Nature*, Law *of Nations*, and the *Civil* and *Municipal* Law of each particular Country. Division of Law.

Book I. The *Law of Nature* comprehends those *Dictates* which *Nature hath taught all living Creatures*, Instances whereof are *Self-defence*, *Education of Children*; and generally, all *those common Principles, which are common to Man and Beasts*; *and this is* rather *innate Instinct*, than *positive Law.*

Law of Nations. The *Law of Nations* is peculiar to *Mankind only*, *dictated by right Reason*, and is divided into the *Original* and *primary Law of Nature*, that *flows* from the *first* and *purest Principles* of *right Reason*; such as *Reverence* to GOD, *Respect to our Country*, and *Parents.* And the *secondary*, and *consequential Law of Nature*, *consisting of these general Conclusions*, *in which ordinarly all Nations agree*, and which they draw by way of necessary consequence, *from those first Principles.* And under this part of the Law of Nations, are comprehended, the *Obligations* arising from *Promises*, or *Contracts*; the *Liberties* of *Commerce*, the *Ransoming* of *Prisoners*, *Security* of *Ambassadors*, and the like.

Municipal Law. *Civil*, or *Municipal Laws*, *are the particular Laws and Customs of every Nation*, or *People*, *who are under one Sovereign Power.*

The

Tit. I.

Roman Law.

The *Romans* having ſtudied with great exactneſs the Principles of Equity and Juſtice, their Emperor *Juſtinian* did cauſe digeſt all their Laws into one Body, which is now called by moſt polite Nations (for its *Excellency*) the *Civil Law*; and as this Civil Law is much reſpected generally, ſo it has great influence in *Scotland*, except where Our own expreſs Laws or Cuſtoms have receded from *it. And by the Common Law in our Acts of Parliament is meant the † *Civil Law.*

* K. J. 6. Par. 8. Act 131.

† K. Ja. 4 Par. 4. Act 51. K. Jam. 5. Par. 6. Act 80. Q. Mary Par. 5. Act 22. K. Ja. 6. Par. 1. Act 31.

The *Popes of* Rome, in Imitation of the *Civil Law*, made a Body of Law of their own; which, becauſe it was compiled by Churchmen, it was called *The Canon Law* ‖: and though it has here no poſitive Authority, as being compiled by private Perſons at the deſire of the Popes, eſpecially ſince the Reformation; yet our *Eccleſiaſtick Rights*, were ſettled thereby before the Reformation: And becauſe many things in that *Law*, were founded upon *material Juſtice*, and exactly calculated for all Churchmen; therefore that Law is yet much reſpected among us, eſpecially in what relates to *Conſcience, and Eccleſiaſtick Rights.*

‖ Canon Law.

Book I.

Municipal Law of *Scotland.*

Our *Municipal Law* of *Scotland*, is made up partly of our *written* and partly of our *unwritten Law*: Our *written Law* comprehends, First, our *Statutory Law*, which conſiſts of our *Statutes* or *Acts* of *Parliament. Secundo*, The *Acts* of *Sederunt*, which are *Statutes made by* the *Lords* of *Seſſion*, by *virtue of a particular Act of Parliament*, * *impowering them to make ſuch Conſtitutions as they ſhall think fit, for* ordering the *procedure* and *forms* of *adminiſtrating Juſtice*, and theſe are called Acts of *Sederunt*; becauſe they are made by the Lords *ſitting in Judgment*, but are not properly Laws, the *Legiſlative Power* being the *King's Prerogative. Tertio*, The Books of *Regiam Majeſtatem*, which are generally looked upon as a part of Our Law; which with the *leges Burgorum*, and the other Tractates joined by *Skeen* to them, are called the *Old Books of Our Law*, by many expreſs Acts of Parliament *. Though the Books of *Regiam Majeſtatem*, were originally but the Works of one private Lawyer, writing by way of Inſtitution, and are now very much abrogated by Cuſtom.

* Acts of Parliament.

Acts of *Sederunt.*

K. Ja. 5. Par. 7. Act 93.

Regiam Majeſtatem.

* K. Ja. 1. Par. 3. Act 54. K. Ja. 3. Par. 14. Act 115.

Unwritten Law.

Our unwritten Law, comprehends *the conſtant Tract of Deciſions, paſt by the* Lords

Lords of Seſſion, which is conſidered as Law; the Lords reſpecting very much their own Deciſions; and though they may, yet they uſe not to recede from them, except upon *grave Conſiderations*. *Secundo*, our *Antient Cuſtoms*, make up part of our *Unwritten Law*, which have been univerſally received among us. The *tacite Conſent* of *King* and *People*, operating as much in theſe as *their expreſs concourſe* does in making Laws: And ſuch is the Force of Cuſtom or Conſuetude, that if a Statute after long ſtanding has never been in obſervance, or having been, has run into deſuetude, *Conſuetude* prevails over the *Statute* till it be renewed either by a *ſucceeding Parliament*, or by a *Proclamation from the Council*: For though the Council *cannot make Laws*, yet they *may revive them*. Tit. I.

Some Laws are called *Declaratory*, becauſe *they do not introduce any new Law*, *but declare what formerly was Law*; and theſe may *look backward*, (that is to ſay) *Caſes even Prior to the Statute muſt be Regulated by them*; though generally *Laws look forward*, and regulate only future Caſes. Declaratory Laws.

Laws ſhould Command, not Perſwade; and though the *Rubrick* (or Title) and

Book I.

Narrative of the Statute, may direct a doubting Judg, yet if the Statutory words be clear, they should be followed in all Cases.

All Laws should be so interpreted as to evite Absurdities, and as may best agree with the Mind of the *Legislator* and *Analogy*, or general design of the Common Law.

Correctory Laws.

Correctory Laws (so we call these which *abrogate* or *restrict former Laws*) *are to be strictly interpreted, for we should recede as little as can be from received Laws.*

Favourable Laws.

Favourable Laws are to be extended, and the *parity of Reason* often prevails with our Judges to extend Laws to Cases that are founded on the same Reason with what is expresly determined by the Statute.

TIT. II.

Of Jurisdiction and Judges in General.

Jurisdiction of Judges.

HAving resolved to follow *Justinian*'s Method, (to the end there may be as little difference found betwixt the Civil Law and ours, as is possible; and

that the Reader may not be distracted by different Methods) I do resolve, First, to lay down what concerns the Persons of whom the Law treats. *Secundo*, what concerns the things themselves treated of, such as *Rights*, *Obligations*, &c. *Tertio*, The *Actions whereby these Rights are pursued*, which answers to the *Civilians*, *Objecta juris*, viz. *Persona*, *Res*, & *Actiones*. Tit. II. Objecta Juris.

The *Persons* treated of in Law, are either *Civil* or *Ecclesiastick*, the Chief of both which in a Legal Sense are *Judges*, with whom we shall begin. And for the better understanding of their Office, it is fit to know, that *Jurisdiction is a Power granted to a Magistrate to cognosce upon, and determine in Causes, and to put the Sentence or Decreet to execution, in such manner as either his Commission, Law, or Practice does allow.* Persons Civil and Ecclesiastick.

All *Jurisdiction flows originally from the King*, so that none have Power to make *Deputes*, except it be contained in their *Commission*; and if a *Depute* appoint any under him, that *Sub-Depute* is called properly a *Substitute*; and every Judge is answerable for the *Malversation* of his *Depute*. K. C. 2. Par. 1. Act 2. Par. 3. Act 10.

Book I.

Jurisdiction Cumulative and Privative.

Jurisdiction is either *Cumulative*, or *Privative*; *Cumulative Jurisdiction is when two Judges have Power to judg the same thing:* And generally it is to be remembred, that the King is never so denuded, but that he retains an inherent *Power to make other Judges with the same Power that he gave in former* * *Commissions:* And thus he may erect Lands in a *Regality*, within the Bounds of an *Heritable Sheriff-ship, and Burghs Royal*, within the Bounds of a *Regality*; and these Bounds within which a Judg may exerce his Jurisdiction, is called his *Territory*; so that if any Judg *exercise Jurisdiction without his Territory*, his Sentence is null; and among those who have a *Cumulative Jurisdiction*, he who first cites, can only Judg; and this is called *Jus Præventionis.*

* K. C. 2. Par. 3. Act. 18.

Privative Jurisdiction, is when one *Judg has the sole Power of Judging, exclusive of all others*; such Power have the Lords of *Session* in judging *Declarators of Property*, *Actions of proving the Tenor*, *Cessiones Bonorum*, &c.

Jurisdiction is founded to any Judg, either because the Defender *dwells within his Territory*, which is called, *Sortiri forum ratione domicilii:* or, *Secundo*, because

cauſe the *Crime was committed within his Territory*, which is called *Ratione delicti*; or, *Tertio*, If the Perſon purſued, have any immoveable Eſtate within his *Territory*, though he live not within the ſame, he may be purſued by *any Action to affect that Eſtate*, which is called *ſortiri forum ratione rei ſitæ*. Tit. II.

A Juriſdiction is ſaid to be Prorogate, when a Perſon not otherways ſubject, ſubmits himſelf to it, as when he compears before an incompetent Judge, and propones Defences. Prorogate Juriſdiction.

All Judges with us muſt take the *Oath of Allegiance*, * and the *Teſt*, † whereby they Swear *to maintain the Government of Church and State, as it is now eſtabliſhed*; and an Oath *de fideli adminiſtratione*, before they exerce their Office: and no *excommunicate Perſon, nor Rebel againſt the Government*, can Judg by our Law. * K. C. 2. Par. 1. Seſſ. 1. Act 11. † Par. 3. Act. 18.

If a Perſon be purſued before a Judg who is not competent, he may complain to the *Lords of Seſſion*, and they will grant *Letters of Advocation*, whereby they *Advocate*; that is to ſay, *call that Cauſe from the incompetent Judg to themſelves:* And if after the *Letters of Advocation* are intimated to that Judge, he Advocation of Cauſes.

yet

Book I.

yet proceed, his Decreet will be null, as given *Spreto mandato.*

Division of Jurisdictions.

Jurisdiction is either *Supream*, *Inferior*, or *Mixt*: These Courts are properly called *Supream*, from whom *there is no Appeal to any Higher Judicatory*, such as the *Parliament*, *Privy Council*, *Lords of Session*, the *Criminal Court*, and *Exchequer*.

Supream Courts.

Inferior Courts.

Inferior Judges are such, *whose Decreets and Sentences are liable to the Reviews of the Supream Courts*, as *Sheriffs*, *Stewards*, *Lords of Regality*, *Inferior Admirals*, and *Commissars*, *Magistrates of Burghs Royal*, *Barons*, and *Justices of Peace*. *Mixt Jurisdiction participates of the Nature both* of the *Supream* and *Inferior Courts*; such a Jurisdiction have the *High Admiral*, and *Commissars of Edinburgh*. Both which are in so far *Supream*, that *Maritim Affairs*, and *Confirmations* of *Testaments*, must come in and be tabled before the *High Admiral*, and *Commissars of Edinburgh*, in the *first instance*. As also, they both can reduce the Decreets of *Inferior Admirals* and *Commissars*: But seeing their Decreets are subject to the review of the Lords of Session, they are in so far Inferior Courts.

No

No inferior Judg can judg in the Cauſes of ſuch as are *Couſin-germans* to him, or of a nearer degree, either of *Affinity* or *Conſanguinity*: But there is ſo much truſt repoſed in the *Lords of Seſſion*, that by a ſpecial * Statute, they can only be declined in Caſes relating to their *Fathers*, *Brothers*, *Sons*, *Nephews*, or *Uncles*; which by a late Statute *, is likewiſe extended to the degrees of *Affinity*, and to the *Lords of Privy Council* and *Exchequer*, and the *Commiſſioners* of *Juſticiary*, *and to all other Judges within the Kingdom.*

* K. J. 6. Par. 14. Act 212.

* K. C. 2. Par. 3. Act 13.

The Members of the *College of Juſtice* have this Privilege, that they cannot be purſued before any Inferior Judg; and if they be, the Lords will Advocate the Cauſe to themſelves.

Privilege of the College of Juſtice.

TIT. III.

Of the Supream Judges and Courts of SCOTLAND.

THe *King* is the *Author* and *Fountain* of all Power, and is an *abſolute Prince*, *having as much Power as any King or Potentate whatſoever*, * *deriving his*

* K. J. 6. Par. 15. Act. 251.

Book I.

his Power from GOD Almighty alone *, *and ſo not from the People.* The ſpecial Privileges that he has, are called, *His Prerogative Royal*; ſuch as that he only can make *Peace* or *War*, call *Parliaments*, *Conventions*, *Convocations* of the *Clergy*, make Laws †: And generally all Meetings called without his ſpecial Command are puniſhable ‖: he only can remit Crimes, legitimate Baſtards, name Judges and Counſellors, give Tutors Dative, and naturalize Strangers, and is *Supream over all Perſons, and in all Cauſes, as well Eccleſiaſtick as Civil* *.

* K. C. 2. Par. 1. Seſſ. 1. Act 5. and 15. Par. 3. Act 2.

† Act 3. & 11. Par. 1. Ch. 2.

‖ K. C. 2. Par. 1. Seſſ. 1. Act 2.

* K. J. 6. Par. 18. Act 1.

K. C. 1. Par. 1. Act 5.

K. C. 2. Par. 2. Seſſ. 1. Act 1.

The Parliament of old was only the King's *Baron Court*, in which all Freeholders were obliged to give ſute and preſence in the ſame manner that Men appear yet at other Head Courts. And therefore, ſince we had Kings before we had Parliaments, it is evident that the King's Power flowed not from them.

The Parliament is called by Proclamation now on Forty days, though it may be adjourned by Proclamation on Twenty days preceding the prefixt day, at which it ſhould have met; but of old it was called by *Brieves* out of the *Chancellary*. It conſiſts of *three Eſtates*, viz. the *Arch-Biſhops* and *Biſhops*; and before

fore the Reformation, all *Abbots* and *Mitred Priors* ſat as *Church-men*. *Secundo*, The *Barons*, in which Eſtate are comprehended all *Dukes*, *Marqueſſes*, *Earls*, *Viſcounts*, *Lords*, and the *Commiſſioners* for the Shires; for of old all Barons who held of the King did come; but the Eſtates of leſſer Barons not being able to defray this Charge, they were allowed to ſend Commiſſioners for every Shire: * And generally every Shire ſends two, who have their Charges born by the Shire. *Tertio*, The *Commiſſioners for Burghs Royal*, each whereof is allowed one, and the Town of *Edinburgh* two; though all the three Eſtates muſt be cited, yet the Parliament may proceed, albeit any one Eſtate were abſent, or being preſent would diſaſſent. The *Legiſlative Power is only in the King, and the Eſtates of Parliament only conſent*; and in Parliament *the King has a Negative Voice, whereby he may not only hinder any Act to paſs, but even any Overtures to be firſt Debated there.* The Acts of Parliament muſt be proclaimed upon Forty days, that the *Lieges* may know them; and till theſe Forty days elapſe, they are not binding *.

Tit. III.

* K. J. 1. Par. 7. Act 101. K. J. 6. Par. 11. Act 311.

* K. J. 6. Par. 7. Act 128.

Book I.

To secure the Crown against Factions, and impertinent Overtures in open Parliament, our Parliaments choose before they proceed to any business, *eight* out of each *State*, who with the *Officers of State*, determine what Laws or *Overtures* are to be brought in to the Parliament; and they are therefore called *The Lords of Articles:* And are chosen in manner following, First, the whole Bishops go by themselves, and the Nobility by themselves; and the Clergy make choice of eight Noblemen, and the Noblemen make choice of eight Bishops; and then both Clergy and Nobility meet together, and make choice of eight Barons, and eight Burgesses; which Election being reported to the Parliament, it is by them approven: And then the Commissioner adds to them *the whole Officers of State**.

Lords of the Articles.

*K. C. 2. Par. 1. Sess. 3. Act 1.

We have another meeting of the *three Estates*, called, *The Convention of Estates*; which is now called upon Twenty days, and proceeds in the same way that the Parliament does, differing only from it in that the Parliament can both impose Taxations, and make Laws; whereas the *Convention of Estates* can only impose, or rather offer Taxations, and make Statutes for

Convention of Estates.

for uplifting thoſe particular Taxations, but can make no Laws. And of old, I find by the *Regiſters* of the *Conventions*, (the eldeſt whereof now extant, is in *Anno* 1583.) that the *Convention of Eſtates conſiſted of any number of the three Eſtates, called off the Streets ſummarly by the King*; and yet they cried down or up Money, and judged Proceſſes, which now they do not. Tit. III.

Privy Council.

The *Privy Council* is *conſtituted by a ſpecial Commiſſion from the King, and regularly their Power extends to Matters of Publick Government*; *in order to which they puniſh all Riots*, for ſo we call *Breach of Peace*. *They ſequeſtrate Pupils, give Aliments to them, and to Wives who are ſeverely uſed by their Husbands*, and many ſuch things which require ſo *ſummar procedour*, as cannot admit of the delays neceſſary before other Courts: And yet if any of theſe dip upon Matter of Law, (for they are only Judges in *facto*) they remit the Cognition of it to the Seſſion, and ſtop till they hear their Report. The *Council alſo may delay Criminal Executions, and ſometimes change one Puniſhment into another, but they cannot remit Capital Puniſhments: They may alſo Adjourn the Seſſion, or any other Court:* It has its own

Book I.

own *Preſident*, who preſides in the Chancellor's abſence, and its own Signet and Seal: All who are cited to compear there, muſt be *perſonally preſent*, becauſe ordinarly the Purſuer concludes, that they ought to be *perſonally puniſhed*. All *Dyets are peremptor*, all Debate is in Write, no Advocate being ordinarly allowed to Plead before them, becauſe the Council only judges in Matters of Fact.

The Lords of Council and Seſſion.

The Lords of *Council* and *Seſſion* are Judges in all Matters of *Civil Rights*; of old they were choſen by the Parliament, and were a Committee of Parliament *. But the preſent *Model* was fixt and eſtabliſhed by *King* James *the Fifth*, after the Model of the Parliament of *Paris* *.

* K. J. 2. Par. 14. Act 61, 62, & 63.

* K. J. 5. Par. 5. Act 36, 37, 38, 39, 40.

Of old it conſiſted of ſeven *Eccleſiaſticks*, and ſeven *Laicks*, and the *Preſident* was a *Churchman*; but now all the fifteen are *Laicks*. And there ſits with them four Noblemen, who are called *Extraordinary Lords*, and were allowed to ſit to learn rather than decide; but now they Vote as well as the *Ordinary Lords*. All the Lords are admitted by the King, and by Statute cannot be admitted till they be Twenty five Years of * Age, and except they have a 2000 *lib.* or 20 *Chalders* of *Victual* in yearly Rent. Nine are a *Quorum*.

* K. Ja. 6. Par. 12. Act 132.

Crimes

Crimes of old, were judged by the *Juſtice General*, *Juſtice Clerk*, and *two Juſtice Deputes*; but now *five Lords of Seſſion* are joined to the Juſtice General, and Juſtice Clerk, and they are called the *Commiſſioners of Juſticiary*, becauſe they ſit by a ſpecial Commiſſion: Four of which number make a Quorum in time of Seſſion, three in time of Vacance, and two at Circuit Courts *. Tit. III. Criminal Judges. * K. C. 2: Par. 2. Seſſ. 3. Act 18.

The *Exchequer*, is the King's Chamberlain-Court †, wherein he judges what concerns his own Revenues; it conſiſts of the *Theaſaurer*, (in whoſe Place are ſometimes named *Commiſſioners of the Theaſaurary*) the *Theaſaurer Depute*, and as many of the Lords of Exchequer as His *Majeſty* pleaſes. Exchequer. † K. C. 1: Par. 1. Act 18.

The *High Admiral* has a Commiſſion from the *King* to judge in all Maritime Affairs, not only in Civil but alſo in Criminal Caſes, where the Crime is committed at Sea, or within Flood-mark; nor can the Lords of Seſſion advocate Cauſes from him ‖, though they can reduce his Decreets, as he does the Decreets of all inferior Admirals, or Admiral Deputes. High Admiral. ‖ K. C. 2: Par. 3. Acts 16:

TIT. IV.

Of Inferior Jurisdictions and Courts.

NO Judicature whatsoever can sit in time of Parliament, without a Dispensation from the Parliament; and no Inferior Court can sit in time of Vacance without a Dispensation from the Lords of Session: But after *Michaelmas* Head Court the Restriction ends, and they may at any time proceed to *cognosce Crimes*, without Dispensation for *Interest Reipublicæ*, that *Crimes be punished without delay.*

Sheriff. The *Sheriff* is the *King's Chief* and *Ancient Officer*, for preserving the *Peace*, and putting the Laws in execution ‖; he has both a Civil and *Criminal Jurisdiction*, and his Commission is under the *Great Seal*; he is obliged to raise the *Huy and Cry* after all *Rebels*, and to apprehend them when required; to assist such as are *violently dispossest*; to apprehend such as *say Mass*, or *trouble the Peace*, and take Caution for their appearance *: He is *Judge* in all Crimes, except Treason, and the *four Pleas* of the *Crown*,

‖ K. J. 6. Par. 12. Act 24.

* K. C. 2. Par. 1. Sess. 3. Act 15.

Crown, to wit, *Murder*, *Fire-raiſing*, *Robbery*, and *raviſhing of Women* *; but Murder he can only judg, if the Murderer was taken with *red Hand*, that is to ſay, *immediately committing the Murder*; in which Caſe, he muſt proceed againſt him *within three Suns*; and in *Theft* he may *judg*, if the *Thief* was taken with the *Fang*. Tit. IV.

* Leg. Mak. 2. Act 11. Quoniam Attach. cap. 79.

The *Sheriff* is alſo *Judg competent*, to puniſh *Bloodwits*, for which he may fine in 50 *Pounds Scots*, but no higher *Regularly*; except the *Riot* be *Atrocious*, or *aggravated* by the Circumſtances of *the Time and Place*, when and where it was committed, or of the Perſons upon whom it was committed. He may likewiſe for *Contumacy* fine in 50 Pound *Scots*.

Royal Burghs are not *Sheriffs* within themſelves, except the *King* grant them the *Privilege* by a ſpecial *Conceſſion*; and even when they are erected *Sheriffs* within themſelves, they are not exem'd from the *Sheriffs Juriſdiction*, within whoſe Bounds the *Burgh* doth lye; but they have only a *Cumulative* Power with them; ſo that there is *locus Prevention*, and the firſt Atacher will be preferred: But if their Erection contain a Power of Repledging from the *Sheriff*, then they have

Book I. the same Power that is *competent* to a Lord of *Regality*.

Lords of Regality. A *Lord of Regality is he who has the Land whereof he is Proprietor or Superior, erected with a Jurisdiction equal to the Justices in Criminal Cases, and to the Sheriff in Civil Causes; he has also right to all the Moveables of Delinquents and Rebels, who dwell within his own Jurisdiction*, whether these *Moveables* be within the Regality or without the same: And because he has so great Power, therefore no *Regality* can *legally be granted except in Parliament* *.

*K. J. 2. Par. 11. Act 43.

Repledgiation. The *Lord of Regality*, has also by his Erection *Power to repledg from the Sheriff*, and even from the *Justices* in † all Cases except *Treason*, and the *Pleas* of the *Crown*, *that is to say, to appear, and crave that any dwelling within his Jurisdiction, may be sent back to be judged by him*; and he is obliged to find caution that he shall do Justice upon the *Malefactor* whom he *repledges* within Year and Day, and the *caution* is called *Culreach* *.

†K. J. 6. Par. 11. Act 29.

* Quoniam Attach. c. 89.

Stewart. The *Stewart* is the *King's Sheriff* within the *King's* own proper Lands, having as much Power and Privilege as a *Regality*; and these were erected where the Lands

Lands having been erected before in *Earldoms* or *Lordſhips*, fell in the *King's* Hand by forefaulture or otherwiſe. For elſe the *King* appointed only a *Baillie* in them, and theſe *Juriſdictions* are called *Bailliaries*, the *Baillies* of the King's proper Lands having the ſame Power with the *Sheriff*. And all theſe, *viz.* the *Sheriff*, the *Stewart*, and the *Lord of Regality*, proceed in their *Courts* after the ſame way, and each of them has a *Head Burgh* where they hold their *Courts*, and where all Letters muſt be executed and regiſtrated. Tit. IV. Baillie.

The *Prince of Scotland* has alſo an *Appanage* or *Patrimony*, which is erected in a *Juriſdiction* called the *Principality*. The Revenues come into the *Exchequer* when there is no *Prince*; but when there is one, he has his own *Chamberlain*. Prince of Scotland.

Juſtices of Peace, are theſe who *are appointed by the King, or Privy Council*, to *advert to the keeping of the Peace*; and they are Judges to *petty Riots*, *Servants Fees*, and many ſuch like, relating to good Neighbour-hood, expreſt in the Inſtructions given them by the *Parliament* *, and are named by the *Council*; albeit, by the foreſaid *Statute*, the *Nomination* is to Juſtices of Peace. * K. C. 2. Par. 1. Act 38.

Book I. be by His *Majesty* and his *Royal Successors*, which the King has now remitted to the *Privy Council*.

Constables. The *Justices of Peace* do name *Constables*, within their own Bounds, from Six Months to Six Months; Their *Office is*, to *wait upon the Justices*, and *receive Injunctions from them*, *delate such Riots* and *Crimes* to the *Justices*, as *fall under their Cognisance*; *apprehend all suspect Persons*, *Vagabonds* and *Night-walkers*, as is at length contained in their Injunctions, given them by the foresaid *Act*.

Baron Courts. Every *Heritor* may hold *Courts* for causing his Tennants pay his Rent: And if he be Infeft *cum curiis*, he may decide betwixt Tennant and Tennant in small Debts, and may judg such as *commit Blood on his own Ground*, though his Land be not erected in a *Barrony*; but if his Land be erected in a *Barrony*, (which the *King* can only do) he may (like the *Sheriff*) *unlaw* for *blood-wits*, in 50 *lib.* and for absence in 10. And if he *have power of Pit* and *Gallows*, he has as ample a *Criminal Jurisdiction* as the *Sheriff*, though with this difference, that the *Sheriff* can judg a *Thief upon Citation*, whereas the *Baron* can only judg him if he apprehend him within the *Barrony*: And

And if the *Sheriff* have firſt *cited* or *attached* the *Malefactor*, he excludes the *Barons Juriſdiction* by that prevention. Tit. V.

TIT. V.

Of Eccleſiaſtick Perſons.

SInce the *Reformation*, the *King* is *come by Our Law in Place of the Pope* *, and all Rights to *Kirk-lands*, muſt be confirmed by him, elſe they are null †. His *Majeſty* only can call *Convocations* of the *Clergy*, (for ſo we call our *National Aſſemblies* ‖) and his *Commiſſioner* ſits in them, and has a Negative.

We have *two Archbiſhops*, and *twelve Biſhops*, and they are thus *elected*; the *King* ſends to the *Chapter* a *Conge de Eſlire*, (which is a *French* word, ſignifying a *Power to Elect*) and with it a Letter recommending a Perſon therein named, and the *Chapter* returns their Election: whereupon the *King* grants a *Patent* to the Elected, giving a Right to the Revenue during life, and a *Mandate* to the *Archbiſhop* or *Biſhops* to Conſecrate him: Both which paſs the *Great Seal* *.

* K. J. 6. Par. 1. Act 2.

† K. J. 6. Par. 9. Act 7. Convocation of the Clergy.

‖ K. J. 6. Par. 8. Act 131. K. C. 2. Par. 1. Seſſ. 1. Act 4. Seſſ. 3. Act 5. Archbiſhop and Biſhops.

* K. J. 6. Par. 22. Act 1.

Book I.

Synods.

The *Archbiſhops* and *Biſhops have the ſole Power of calling Synods*, which is a *Provincial Aſſembly of all the Clergy within one Diocie* *; and in theſe they name the *Brethren* of the Conference: who are like the *Lords of Articles* in the *Parliament*; and by their Advice the *Biſhops* depoſe, ſuſpend, and manage.

* K. J. 6. Par. 21. Act 1.

Chapter.

Biſhops have their *Chapters*, without whoſe Conſent, or the *major Part*, the *Biſhop* cannot alienate nor dilapidate any part of their Patrimony *, which *major Part* muſt ſign the Deeds done by the *Biſhops*: And it is ſufficient if thoſe of the *Chapter* ſign at any time even after the *Biſhop*; but it muſt be in his lifetime: Nor are *Minors*, or *Abſents* counted; and one having two *Benefices*, has two Votes: but the Appending of the *Seal* is by ſpecial *Statute* declared to be ſufficient in Deeds done by the *Archbiſhop* of St. *Andrews*, without the *Subſcriptions* of the *Chapter* †.

* K. Ja. 6. Par. 18. Act 3.

† K Ja. 6. Par. 19. Act 8.

Vicars.

A *Parſon* or *Rector Eccleſiæ*, is he *who is preſented to the Teiths, jure proprio*; but becauſe of *old Parſonages* were beſtowed on *Monaſteries*, therefore they ſent *Vicars*, ſo called, becauſe they ſerved the *Cure for them*; and who got a ſhare of the Stipend for their pains, either *ad placitum*:

placitum; and they were called *ſimple Vicars*, or for *Life*, and they were called *perpetual Vicars*: and after the Reformation, the Churches which ſo belonged to them continued *Vicarages* ſtill; The *Titular*, who came in the place of the *Convent*, retaining the right to the *Parſonage-Duties*. Tit. V.

There were in the time of *Popery*, *Collegiat Kirks* built, and *doted by Kings and great Men*, for *ſinging of Maſs*, which were governed by a *Provoſt*, and ſome for *ſinging*, who were called *Prebends*: And becauſe ſome *Pariſhes* were wide, ſome were allowed to build a *Chapel* for their *private Devotion*: And ſince the *Reformation*, theſe *Chaplanaries* and *Prebendaries* are allowed to be beſtowed by the *Patrons*, upon *Burſers* in *Colleges*, notwithſtanding of the *Foundations* *. Collegiat Kirks. Chaplanaries. * K. Ja. 6. Par. 1. Act 12.

For underſtanding all theſe, it is fit to know, that the *Primitive Church*, either to invite Men to *build* or *dote*, or to reward ſuch as had, did allow ſuch as either had built, or had beſtowed the Ground whereon to build, or had *doted a Church* already built, to *preſent alone*, if they were the only *Benefactors*, or *by turns* if they were moe; and they were

Book I. called *Patrons*, or *Advocati Eccleſiarum*, according to that,

Patronum faciunt, dos, ædificatio, fundus.

Patron. When a *Church* vaiks, the *Patron* muſt preſent within ſix Months a fit *Perſon* to the *Biſhop*; elſe the right of *Preſentation* falls to the *Biſhop*, *jure devoluto* *: but if the *Biſhop* refuſe to admit and collate the Perſon preſented, the *Patron* muſt complain to the *Archbiſhop*; and if he alſo refuſe, or delay, the *Privy Council* will grant Letters of Horning againſt the *Biſhop*, to receive the *Perſon* preſented †; and during the *vacancy* upon that refuſal, the *Patron* may retain the *vacant ſtipends*.

* K. Ja. 6. Par. 2. Act. 1.

† Act foreſaid.

Upon this *Preſentation* the *Biſhop* cauſes ſerve an *Edict* on nine Days, wherein all Perſons are after *Divine Service* advertiſed to object why ſuch a Man ſhould not be admitted to the *Benefice*: And if none *object*, the *Biſhop* confers the Church and Benefice upon the *Perſon* preſented; and this is called a *Collation*: after which, the *Biſhop* cauſes enter him, who is ſo *collated*, by cauſing give him the *Bible* and the *Keys* of the *Church*; and this is called *Inſtitution*: *Preſentation* gives only

Collation and Inſtitution.

jus

jus ad rem, and *Inſtitution jus in re*, and is as a *Seaſin*. Tit. V.

If the *Biſhop* be *Patron* himſelf, he confers *pleno jure*; and the *Preſentation* and *Collation* are the ſame: *Biſhops* alſo have *Menſal Churches*, ſo called, becauſe they are *de menſa Epiſcopi*, being a part of his *Patrimony*, in which he ſerves by his *Vicars*, and *plants* as *Dioceſian Biſhop*; and if a *Town* or *Paroch* reſolve to make a *ſecond Miniſter* when they are not *Patrons*, he is called a *Stipendiary Miniſter*; (as are all Miniſters who are preſented to *modified Stipends*) and he is *collated* and *inſtituted* alſo, but the *Patron's* Preſentation is ſufficient in *Prebendaries* and other *Benefices*, which has not *curam Animarum*; and that without the neceſſity of *Collation*, or *Inſtitution*; the *Biſhop* having no other Intereſt in the *Benefices*, but in ſo far as they concern the *cure of Souls*. Menſal Churches.

By Act of Parliament, all *Miniſters* muſt have a competent Stipend, not below *eight Chalder of Victual*, or 800 *Merks*, or above a 1000 *Merks* or 10 *Chalders of Victual*, (except there be juſt reaſon to give leſs) * together with a *Manſe* and *Gleib*. But the *Commiſſioners for plantation* of Kirks, are not now preciſely Miniſters Stipends. * K. Ja. 6. Par. 22. Act 3.

Book I. preciſely tied to theſe Proportions, but may modify either more or leſs, according as they ſee cauſe.

Manſe. The *Manſe*, *à manendo*, is the place where the *Miniſter* is to dwell; the *Gleib*, from *Gleba terræ*, is *a piece of Land for Corn and Fother to his Beaſts*: If there was a *Manſe* of old belonging to the *Parſon* or *Vicar*, the *Miniſter* has right to it; if there was none, the *Parochiners* muſt build one, not *exceeding a* 1000 *lib.* and not *beneath* 500 *Merks* *, at the ſight of the *Biſhop* of the *Diocie*, or ſuch *Miniſters* as he ſhall appoint, with *two or three* of the moſt diſcreet Men in the *Paroch*; as alſo the *Heritors* are liable to repair the *Manſe*: But the preſent *Incumbent* is obliged to leave it in as good *condition* as they gave it to him †.

* K. Ja. 6. Par. 13. Act 1621.

† K. Ja. 6. Par. 21. Act 8.

The *Miniſters Gleib*, is to comprehend *four Acres of Arrable Land*, or *ſixteen ſowms-graſs* where there is no *Arrable Land*, which is to be deſigned out of the Lands which belonged of old to *Abbots*, *Priors*, *Biſhops*, *Friers*, or any other *Kirk-lands* within the *Pariſh* ‖; with freedom of *Foggage*, *Paſturage* for a *Horſe* and two *Cows*, *Fewel*, *Feal* and *Divot*; which *Gleibs* are to be deſigned by *Miniſters* named by the *Biſhop*, with the advice

‖ K. Ja. 6. Par. 3. Act 48.

vice of two *of the moſt honeſt and godly of the Pariſhoners*, and the deſignation is to be ſigned by the deſigners *. Tit. V. * K. Ja. 6. Par. 11. Act 116.

If a *Biſhop* or *Miniſter* be *conſecrated*, *tranſlated*, or *entered* to his Benefice before *Whitſunday*, he has right to the whole Years Fruits, becauſe *they are then preſumed to be fully ſown*; and if he be depoſed or *tranſported* before *Whitſunday*, for that ſame reaſon he hath no part of that Year: But if he ſerve the *Cure* after *Whitſunday*, and be *tranſported* or *depoſed* before *Michaelmas*, he hath the half of that Year's Stipend; and if he ſerve till after *Michaelmas*, he hath the whole. So that the *legal terms of Benefices are Whitſunday, at which time the Sowing is ended*; and *Michaelmas*, at which time the Fruits are reaped.

The *Relicts*, *Bairns*, *or neareſt of Kin*, have likewiſe right to the *Annat* after their Death, which was introduced by the *Canon Law*, and by a ſpecial *Statute* with us, is declared to be *half a Year's Rent of the Benefice or Stipend, over and above what is due to the Defunct, for his Incumbancy* *: So that if he ſurvive *Whitſunday*, they have the half of that Year for his *Incumbancy*, and the other half as *Annat*, and if he *ſurvive Michael-* * K. C. 2. Par. 2. Seſſ. 3. Act 13.

mas,

Book I.

man, they have the half of the next Year for his *Annat*.

The *Annat* is equally divided betwixt the Relict and the Children; and if the *Defunct* have neither, it belongs to the neareſt of *Kin*; it needs no Confirmation, for it never belonged to the *Defunct*, being a meer Gratuity beſtowed by the *Law* for entertaining theſe, becauſe it is preſumed *Miniſters* have not much to leave them: And for the ſame reaſon it is not affectable by the *Defuncts Creditors*, nor can it be diſpoſed upon by himſelf to Strangers, either in his Teſtament or by Aſſignation.

High Commiſſion.

There is a *Committee of Parliament* always ſitting, called the *Commiſſion for Plantation of Kirks*, or *Valuation of Teinds* (conſiſting of a *Select* number of ſo many of every *Eſtate of Parliament*;) who have Power to *modify* and *augment Miniſters Stipends*, and to *unite* and *disjoin Churches*, &c. whoſe Decreets, becauſe they are a *Committee of Parliament*, cannot be reduced by the *Seſſion*, or any other *inferior Judicature*.

Committee of Parliament.

The *Primitive Chriſtians* remitted the Cognition of all Caſes that related to Religion, as the Matters of *Divorce*, *Baſtardy*, *the Protection of Dying Mens Eſtates*,

Eſtates, to their Biſhops, or ſuch as they imployed under them, who were called *Officials*, and with us are called *Commiſſars*; and are called therefore *Judices Chriſtianitatis*: And they are therefore the only Judges in *Divorce*, becauſe it is the breach of a *Vow*: And to *Scandal*, becauſe it is an offence againſt *Chriſtianity*: And of all Matters referred to *Oath*, (if the ſame exceed not 40 *lib. Scots*) becauſe that Power is contained in their Inſtructions, and that an *Oath* is a *Religious Tie*. Tit. V. Commiſſars.

Every *Biſhop* has his *Commiſſar*, who has his Commiſſion from the *Biſhop* only; and this extends no further than the *Conſtituent's Diocie*. But the *Archbiſhop* of St. *Andrews* has Power to name four *Commiſſars*, who are called the *Commiſſars of Edinburgh*, becauſe they ſit there, and they only are *Judges to divorce upon Adultery*, and can only declare *Marriages null for Impotency*, and to *Baſtardy*, when it has any *Connexion* with *Adultery* or *Marriage*: And they only *may reduce the Sentences of all Inferior Commiſſars* *, though the *Lords of Seſſion* may reduce even their *Decreets and Sentences*. They have *Inſtructions from the King*, which are their Commiſſars of *Edinburgh*.

* K. Ja. 6. Par. 26. Act 6.

Book I. their *Rule*. And these are likewise recorded in the Books of *Sederunt of Session*.

TIT. VI.

Of MARRIAGE.

Having spoken fully of Persons, as they are considered in a Legal sense; we shall now treat of Marriage, which is the chief thing that concerns Persons, and their State in Law.

Marriage. *MArriage* is defined to be the *Conjunction of Man and Wife, vowing to live inseparably together till death.*

By *Conjunction*, here, *Consent* is understood; *nam consensus, non coitus, facit Matrimonium.*

Consent, is either *de futuro* or *de præsenti*. Consent *de futuro*, is a Promise to *solemnize the Marriage*, which in *Law* is Sponsalia. called *Sponsalia*; and this is not *Marriage*; for either Party may resile, *rebus integris*, notwithstanding of the *interveening Promise*, or *Espousals*. Consent *de præsenti*, is that in which *Marriage* does consist; and therefore it necessarily follows,

follows, that none can *Marry* except theſe who are *capable* to conſent, and ſo *Idiots and furious Perſons, durante furore*, cannot *Marry*; nor *Infants*, who have not attain'd the uſe of *reaſon*: that is, when they are within the *Years of Pupillarity*, which is defined in *Law* to be 14 Years in *Males* and 12 in *Females*, *Niſi malitia ſuppleat ætatem.* Tit. VI.

The *Law* in *decency* requires the conſent of *Parents*, though a *Marriage* without it is valid, if the Perſons *Married* be *capable* of conſenting.

By our *Law*, none can *marry* who are nearer related than *Couſin-germans*, which is ſuitable to the *Judicial Law* of *Moſes* *, and the ſame degrees prohibited in *Conſanguinity* are alſo forbidden in *Affinity*.

* *Levit.* chap. 18.

K. Ja. 6. Par. 1. Act 1.

Marriage, is either *Regular* and *Solemn*, or *Clandeſtine*; the *Regular* way of *Marrying* is, by having their Names proclaim'd in the *Church*, three ſeveral times, which we call Proclamation of *Banns*, without which, or a Diſpenſation from the *Biſhop*, the *Marriage* is called a *Clandeſtine Marriage*; and the Parties are *fineable* for it, and both loſe their † *Jus Mariti*, and *Jus Relictæ*, but the *Marriage* is ſtill valid ‖; *Cohabitation* alſo, or dwelling together, is preſum'd

Diviſion of Marriage.

† K. C. 2. Par. 2. Seſſ. 3. Act. 9.

‖ K. C. 2. Par. 1. Seſſ. 14. Act 34.

Book I. to be *Marriage* *, if the Parties were repute, *Man and Wife during their life-time*, and ſo the *Children* are not *Baſtards*; though they cannot prove that their *Parents* were *Married* unleſs it be clearly prov'd that they *were not Married*.

* K. Ja. 4. Par. 6. Act 77. K. C. 2. Par. 2. Act 9. Seſſ. 3.

From the *conjugal Society*, ariſes the communion of *moveable Goods* betwixt *Man* and *Wife*, but the *Adminiſtration* thereof during the *Marriage* is ſolely in the *Husband*; which reaches even to Alienation, and diſpoſing upon the Moveables at his pleaſure, though they be not diſpon'd to him by her, (Marriage being a *Legal Aſſignation* as to this effect) but he has no further *right* to her *Heritage*, ſave that he has *right* to the *Rents of* it, and to *adminiſtrate* and *manage* it, during the *Marriage*, and this is called *Jus Mariti*, and is ſo inſeparable from the quality of a *Husband*, that he cannot by *Our Law renounce his Power of Adminiſtration*, ſo that they are both *Domini* by this *Communion*; but the *Husband* has during the Marriage the Adminiſtration and Diſpoſal of the Goods in the Communion: But a Stranger may effectually convoy an Eſtate to a *Wife*, ſo as that it will never be ſubject to the *Husband's Adminiſtration*.

Communion of Goods.

Jus Mariti.

* The

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The *Husband* is liable during the Marriage to pay her moveable *Debts*; but how ſoon the Marriage is diſſolv'd, he is no further liable to pay her *Debts*, than in as far as he was a *Gainer* by her *Eſtate*, or that there was ſuch diligences done againſt him during the Marriage that affects his Eſtate, either heritable or moveable.

If the *Wife* contract any *Debt*, or do any other Deed after the Proclamation of *Banns*, the *Husband* will not be thereby *Prejug'd*.

The *Husband* is alſo oblig'd to *Aliement his Wife*, and if he refuſe, the *Privy Council*, or *Lords of Seſſion*, *will modify an Aliment* to her out of her *Husband's* means, ſuitable to his Quality, which they will alſo grant, *ob ſævitiam*, if he treat her *Inhumanely*.

The *Husband* is *Tutor* and *Curator* to his *Wife*; and therefore if ſhe had *Tutors* or *Curators* formerly, their Power is *devolved* over by the *Law* upon the *Huſband*; and whatever deeds ſhe does without his conſent are *null*, whether ſhe be *major* or *minor*, and when ſhe is *cited*, he muſt be *cited* for his Intereſt; and if ſhe Marry during the Dependance of a *Proceſs*: The *Husband* muſt be called by *Letters of Supplement*.

Becauſe the *ſole Adminiſtration*, during the Marriage belongs to the *Husband*; *Law* hath ſecured the *Wife*, that ſhe cannot oblige her ſelf when ſhe is cloathed with a *Husband*, albeit with his conſent; and therefore all Bands and Obligations granted by a *Wife*, *ſtante Matrimonio*, are *ipſo jure*, *null*; but if ſhe oblige her ſelf, *ad factum præſtandum*, ſhe will be *liable*, as if ſhe ſhould oblige her ſelf to *Infeft* any Man in Lands properly belonging to her ſelf.

Donatio inter virum & uxorem.

During the *Marriage*, all *Donations* made betwixt *Husband* and *Wife* are *Revokable* at any time in their *life*, (except in ſo far as they are *ſuteable Proviſions*) leſt otherways they might *ruine themſelves*, thorow *Love*, *Fear* or *Importunity*; and that either expreſly, by *revoking* what is done (though they obliged themſelves not to *revoke*) or *tacitly*, by *diſponing to others*, what was ſo *gifted*.

All *Rights* made by a *Wife* to her *Husband*, or any third Party with his conſent and to his behoof, are valid *Rights*; if they be *Ratified* by her before a *Judg*, before whom ſhe is to declare *without the preſence of her Husband, that ſhe was not compelled to do that deed*, and

Swear

Swear that ſhe ſhall never quarrel the ſame: whereas, if they be not *Ratified*, they may be *quarrelled*, as *extorted vi & metu*, or may be *Revoked*, as *donatio inter Virum & Uxorem*, which the *Ratification* before any Judg does abſolutely exclude, *propter Religionem Sacramenti*, the *Ratification* being *extra præſentiam mariti*, though ſhe was forc'd. Tit. VI.

Marriage is diſſolved either by *Death* or *Divorce*, and if the *Diſſolution* of the *Marriage* be by *Death*, there is a difference if the ſamen be within *Year* and *Day* of the *Marriage*, or thereafter; for if either the *Husband* or the *Wife* die within the *Year*, all things done in *tuitu Matrimonii*, become void, and return to the ſame Condition they were in before the Marriage; except there be a *living Child*, *procreate* of the *Marriage*, *who was heard cry*. Diſſolution of Marriage.

If the *Marriage* be diſſolved by *Death* after the Year expires, then the *Wife ſurviving* has right to a third of the *moveable Eſtate* if there be Children, and to the half if there be none, and this is called *jus Relictæ*; and though this right does not hinder the *Husband*, to give or diſpoſe upon his *Moveables* in his *life*, yet *he cannot do any Deed to defraud his* Jus Relictæ.

Book I. *Wife of this Right*, the *Fraud* being *palpable*; ſhe has alſo a right to a *life-rent of the third of the Lands*, wherein he *died infeft*, and this is called a *Widows Terce*; and to any other *Proviſions* contained in her *Contract of Marriage*: And if ſhe be provided to any particular Proviſion, ſhe is excluded from a *Terce* *; *Nam in hoc caſu proviſio hominis tollit proviſionem Legis*, unleſs her *Terce* be expreſly reſerved. A *Wife* has right to her *Paraphernalia*, excluſive both of the *Husband's Dominium* and *Adminiſtration*, by which is meant her wearing Cloaths and Jewels; and the Husband ſurviving has right to the Tocher: And if he marry an *Heretrix*, he has right to all her Lands after her Death, during his own Life, if there be a *Child* of the Marriage who was heard *cry*, and this is called, *the Courteſie of* Scotland *.

Terce.

* K. C. 2. Par. 3. Act. 10.

Paraphernalia.

Courteſie of *Scotland*.

Marriage may be either declared to have been null *ab initio*, for *Impotency*, *Contingency* of Blood, or that either Party ſtands Married; or elſe it may be diſſolved for Adultery. The Cognition of all which belongs to the *Commiſſars* of *Edinburgh* privitively: or for wilful *Deſertion*, to be purſued by an Action for *non adherence*, either before the *Commiſſars*

* Reg. Ma. lib. 2. c. 3. Leg. 8. Burg. cap. 44.

ſars of *Edinburgh*, or any inferior *Commiſſar*, to whoſe Juriſdiction the Parties are liable, after malicios diverting for four *Years*, they being thereupon (after due Admonition to adhere, and Citation for that effect) excommunicated; which Sentence being pronounced, is a ſufficient Cauſe of *Divorce* *: In which Caſes the *Purſuer* muſt give his *Oath* that the *Proceſs* is not carried on by *Colluſion*, and after a *Decreet* of *Divorce* is obtained in either Caſe, the *Party innocent* may *marry*; but the *Party* that is *guilty*, cannot, and beſides loſes all the benefit that they could expect by the *Marriage*. Tit. VII.

* K. J. 6. Par. 4. Act 15.

TIT. VII.

Of Minors, and their Tutors, and Curators.

WHilſt Perſons are within *twenty one years*, the Law preſumes them to want that firmneſs of *Judgment*, which is requiſite for the exact management of their Affairs; and during that time, they are called *Minors* by a general Term; though properly, ſuch only are called *Minors* who are paſt *Pupilarity*, which laſts in Minors.

Book I. in *Males* till *fourteen*, and in *Females* till *twelve*.

Definition of Tutory. *Tutory* may be defined, *a Power and Faculty, to govern the Estates and Persons of Pupils*; and the Law gives *Tutors* and *Curators* for the *management* of their *Affairs*.

Division of Tutors. There are three kinds of *Tutors*, viz. *Tutor nominate*, *Tutor of Law*, and *Tutor dative*. *Tutore nominate*, (who is likeways called *Tutor Testamentar*) is he who is left *Tutor* by the Father in his *Testament*, or any other *write*, and he is not obliged to find *Caution*, or give his *Oath*, *De fideli administratione*; becauſe it is preſumed, the *Parent* hath choſen a ſufficient Perſon.

Tutor Teſtamentar.

The *Father* only can name *Tutors*; but if the *Mother*, or even a Stranger, *give or diſpone* any thing to a *Child*, they may name a *Tutor* to manage what they give; but if there be no *Tutor* nominate, or if he accepts not, then there is place for a *Tutor of Law*, who is ſo called, becauſe he ſucceeds by *Law*, and generally the neareſt *Agnate* (for ſo we call ſuch as are related by the *Father*) who is to ſucceed to the *Minor*, being paſt *twenty five years*, and would be *Heir* to him, is his * *Tutor in Law*: He takes a *Brieff* out of the *Chan-*

Tutor of Law.

* K. J. 3. Par. 7. Act 32.

Chancellary, and *ſerves himſelf before any Judg*, to whom it is directed, and the *Tutor of Law* muſt find *Caution* before he *Adminiſtrate*. Tit. VII.

If he do not *ſerve* within a *year* after the time he might have ſerved, then any Perſon may give in a *Signator* to the *Exchequer*, and he gets a gift under the *Privy Seal*, of being *Tutor Dative*, and finds *caution*, *acted in the Books of Exchequer*: But of old, they found *caution* in the *Commiſſar's Books*: this *Tutor*, and he only, is obliged to make *Faith*, *De fideli adminiſtratione*. Tutor Dative.

If there be moe *Tutors* than one, the *major part* muſt all conſent; but the *Pupil* needs not *ſubſcrive* with his *Tutors*, though a *minor* muſt ſubſcrive with his *Curators*: But if there be a *Tutor*, *ſine quo non*, he muſt always be one of the Managers and Conſenters.

After the years of *Pupilarity*, there muſt be a Summons raiſed at the *Pupil's* inſtance, ſummoning ſome of the *Father's ſide*, and ſome of the *Mother's ſide*, upon nine days warning, to appear before any *Judge*; and at the day, the *Minor* gives in a Liſt of thoſe he intends to chooſe to be his *Curators*, and thoſe who accept muſt ſubſcrive the Acceptation, and they Curators.

Book I. must find Caution *de Fideli* *, upon all which, the *Clerk extracts an Act*, which is called, *an Act of Curatory:* There uſes to be ſometimes *Curators, ſine quibus non*, and the *major part* with theſe are ſtill a *Quorum*, except the *Minor* in his *particular Election* hath appointed otherwiſe; for the *Quorum* is in the *Minor's* Power, and the *Act bears* how many ſhall be a *Quorum.*

* Q. Mary Par. 6. Act 35.

Difference betwixt Tutors and Curators.

There are theſe *differences* betwixt *Tutors* and *Curators*, that *Tutor datur perſonæ, Curator rei*; a *Tutor acts* and *ſubſcrives* for his *Pupil*, a *Curator* with him; but both muſt make *Inventary* of all the *Pupil's Eſtate* before they *adminiſtrate*, with conſent of the neareſt of *Kin* on both ſides; and if they neglect to make *Inventary*, they will get no *Expences* allowed them during their Adminiſtration, and may be removed from their Offices as ſuſpect *; neither have *Salaries:* and both are liable to *Compt*, but not till their *Office expire*, as both have *Action* againſt their *Minors*, for what they *profitably expended* during their *Adminiſtration*, which is called *Actio tutelæ contraria.*

Inventary.

* K. C. 2. Par. 2. Seſſ. 3. Act 2.

If the *Minor* have *Curators*, and do any thing without their conſent to

to his prejudice; (for he may make his condition better without them, but not worſe, the advantage being evident and without *hazard*) then that Act is *ipſo jure null*, that is to ſay, he needs not *revoke*; but if he have no *Curators*, then any Act he does to his own *prejudice* is *valid*; but he muſt reduce the ſame thus, *viz.* he muſt write a *Revocation*, and ſubſcrive it before *two Witneſſes*, and *regiſtrate* it, and thereupon he muſt raiſe and *execute* a *Summons* of *Reduction* of that Act, *ex capite Minoritatis, & læſionis*, before he be 25 *Years of Age*, wherein he muſt make appear, he was both *Minor*, and was *leſ'd*; otherways the *Lords* will not repone him: Though this *Revocation* be not abſolutely neceſſary, yet the *executing* of a *Summons* before 25 is abſolutely neceſſary: and though a *Minor* ſwear not to *Revoke*, yet this *Oath* is declared null by *Law*, and the *Eliciter* of it puniſhable and infamous *; but if he *fraudulently circumvene* another, by ſaying he was *Major*, he will not be reſtored againſt his own *Fraud*. Tit. VII. K. C. 2. Par. 3. Act 19.

A *Tutor* or *Curator*, cannot purſue his *Pupil* till he has *counted* for his *Intromiſſions*; for it is preſum'd he has his *Pupils* Eſtate in his own hands, and whatever

Right

Book I. Right he buys of what belong'd to his *Pupil*, is presum'd to be bought with his *Pupil*'s Means; and so the advantage must *accress* to the *Pupil*.

So careful has *our Law* been to *protect Minors*, and to secure *Old Estates*, that *minor non tenetur placitare super hæreditate paterna* *; that is to say, a *Minor* is not obliged to answer any *Process* that may Evict his *Father's Heritage*; but yet if his *Father's* Right be quarrelled for his *Father's Crimes* or *Delicts*, as in the Cases of *Falshood*, *Forfeiture* or *Recognition*; these Cases are excepted, and he is obliged to answer. *Secundo*, This *Privilege* extends not to *Actions* concerning *Marches*, or *division of Lands*. *Tertio*, It defends not against the *Superiour*, *pursuing* for his *Casualities*. *Quarto*, Where the *Minor's* right is only *quarrell'd consequentially*, the chief right *quarrelled* belonging to a *Major*, there is no place for this Privilege. *Quinto*, It defends not in cases where the *Heritage* was *deriv'd* from *Collaterals*, such as *Brothers* or *Uncles*. *Sexto*, It defends only where the *Heritage* descended even from the *Father* or *Grandfather*, if they died in peaceable Possession, and if no *Process* was intented against them in their own *life-time*. *Septimo*,

* Statut. à Will. c. 39.

Septimo, It takes only place, where the *Father* was *actually infeft*; but then it is *accounted Heritage*, though it was *Conqueſt* by the *Father*. Tit. VII.

The Privilege of *Minority* is in ſome caſes allowed to the *Minor's Heir*: Which are compriſed in theſe following Rules. 1. If a *Minor* ſucceeds to a *Minor*, the time *of Reſtitution is regulated* by his own *Minority*, and not by his *Predeceſſors*. 2. If the *Predeceſſor* be *Major*, and *Intra quadriennium utile*, *reſtitution* is competent during the *Heir's Minority*; but he has no further of the *anni utiles*, than remained to the *defunct* the time of his *deceaſe*. 3. If a *Major* ſucceed to a *Minor*, he has only *quadriennium utile*, after the *Minor's deceaſe*, or ſo much thereof as was *unexpired* at that time. But this Privilege of *Minority* as to the *Expiring* of the *Legal of Apriſings*, is *ſpecial* and *ſingular*; *Vide infra*, Tit. *Apriſ.* and *Adjud.*

Minority ends in both Men and Women when they are 21 *Years of Age compleat*; but after that there are 4 *Years granted*, wherein they may *reduce* what they did to their *Leſion* and *Prejudice* during their *Minority*; and theſe Years are called *Anni utiles*, or *quadriennium utile*.

If

Book I.

Idiotry or furiosity.

If a Man be an *Idiot* or *furious*, he must be found to be so by an *Inquest*, and thereafter his neareſt of *Kin may serve themselves Tutors*; or the *Exchequer* may grant a *Tutor dative*, *if they serve not*; but the *Tutor in Law* will be preferred to that *Tutor dative*, offering to serve *quandocunque*, and it must be proved to the *Inquest* at the time of the Service, that he is *furious*, and when he began to be so, and all Deeds done by *him after that are null*, not only from the *date of the service*, but from the time that he was *found* to be *Idiot*, or * *furious*.

* K. J. 6. Par. 10. Act 18.

Prodigals and their Interdiction.

If a Person be *Prodigal* or *Spendthrift*, he *interdicts himself*, either *voluntarily* which is done by a *Band*, whereby he obliges himself to do nothing without the consent of such Friends as he therein condescends upon; and these are therefore called the *Interdictors*, and if this *Narrative be false*, so that the Person is not *improvident*, as he relates in the *Band*, this *voluntar Interdiction* will be reduced. *Secundo*, *Interdiction* proceeds upon a *pursuit*, at the instance of the *neareſt of Kin*, against the *Prodigal* whom the *Lords* will *interdict* if they see cause: Or 3*dly*, Though there be no *pursuit*, yet if in another *Process* they find he has been often,

or

or is *obnoxious* to be cheated, they will *Interdict him*, *Ex proprio motu*, and these two last are called *Judicial Interdictions*; and no *Interdiction* lasts longer than the *Levity* and *Prodigality* which occasioned it; but this requires also the Sentence of a *Judg*.

Letters of Publication.

Upon this *voluntar Band*, the *Lords of Session* grant *Letters of Publication*; and after these *Letters* are published at the *Mercat-Cross of the head Burgh of the Shire* where the *Person interdicted dwells* and are *registrated*, the *person interdicted* can do nothing to the *prejudice of his heritable Estate*, otherways the *Interdicters* may *reduce* these Deeds as done after the *Publication of the Interdiction*; (for Interdictions extend only to *Heritage*) but yet the Person himself is still liable to *personal Execution*, even upon these Deeds done after *Interdiction*.

Administrator in Law.

A *Father* is likewise in *Law Administrator* to his own *Children*; that is to say, is both *Tutor* and *Curator* to them, if they fall to any *Estate* during their *Minority*, and if either *Pupil* or *Minor* have any *Legal Action to prosecute*, and want *Tutors* or *Curators*, the *Lords*, or any other *Judg* before whom the *Process* is depending, will upon a *Bill Authorize Cura-*

Book I.

Curators, who are therefore called *Curators ad lites*.

Tutors and *Curators* are not *Proprietors* but *Administrators*; therefore they can only *manage* rationally, and do every thing for the *Utility* of the *Pupil*, but even this *Administration* does not impower them to sell Lands, or to renounce any *heritable Right* belonging to the *Pupil*, except for paying of Debt, in which case they must have a *Decreet* for their Warrant; nor does it impower them to set *Tacks* for longer time than their office lasts: Nor can any *Tutor* be *auctor in rem suam*, by authorizing the *Pupil* to do any Deed for his own advantage, such as to become *Principal* or *Cautioner* for him to a third Party.

Diligence of Administrators, Pro-Tutors.

All these *Tutors*, *Curators* and *Administrators*, or any who behave as such, and who are called in our Law *Pro-Tutors*, are liable to do *exact Diligence*; and therefore if any of their *Pupil's Debitors* become *Bankrupt*, or their *Tennants* break, they are liable *in solidum*, so that the *Pupil* may pursue any one of the *Tutors* for the negligence of all the rest; but he has his Relief againſt the rest.

They are likewise liable to put the *Minor's Rents* out upon *Annual rent* within half

half a Year, or a Term, after they receive them, and to put out his Money upon *Annual rent* within a Year, both which times are allowed to get good *Debitors*; but if his *Bands* bear *Annual rent*, they are only obliged to take in these *Annual rents* once during their *Office*, and to turn them in a *principal Sum*, bearing *Annual rent*. Tit. VII.

After *Tutors* and *Curators* have once accepted, they cannot *Renounce*; but if they miscarry or *malverse* in their *Administration*, they may be removed by an Action, as suspect *Tutors*.

If there be more *Tutors* or *Curators*, the *Office* upon the Death of any of them *accresses* to the *Survivers*, except they be named jointly; for then the first Nomination is dissolved by the Death of any one of them, the *Defunct* not having trusted any one; and for the same reason, if a certain number be declared a *Quorum*, the Nomination fails; if so many die as that this number *survives* not, nor does the *Office accress* to such as *survive*.

We have little use in *Scotland*, of what the *Institutions of the Roman Law* teach concerning *Slavery*, or *Patria potestas*; for we as *Christians* allow no Men to be made *Slaves*, that being con- Slavery and Patria potestas.

Book I. trary to the *Christian Liberty*: And the *Fatherly Power*, or *Patria potestas*, has little effect with us; for a *Child* in *Family* with his *Father*, acquires to himself and not to his *Father*, as in the *Civil Law*.

THE

THE INSTITUTIONS Of the LAW of SCOTLAND.

BOOK II.

TITLE I.

Of the Diviſion of Rights, and the ſeveral ways by which a Right may be acquired.

BEing to treat in the *Second Book* of things themſelves, to which we have *Right*, and how we come to have *right to them*, it is fit to know,

That *Dominium* or *Property is the Power of Uſing and Diſponing what is ours, except*

Book II.

cept in so far as we are restricted by Law or Paction: And the Law designing the general Good, allows us not to use our own, so as thereby chiefly to prejudg our Neighbour. *Et in æmulationem vicini.*

The Property of every thing belongs to some Person or Society, and cannot flot in an uncertainty: *Nam dominium non potest esse in pendenti.*

Division of things.

Some things do not fall under *Commerce*, and so we cannot acquire any *Property* in them, such as things common, as the *Ocean*, (though our *King* has *Right* to our narrow *Seas*, and to all the *Shores*.) *Secundo*, Things publick which are common only to a *Nation or People*; *as Rivers*, *Harbours*, *and the Right of Fishing* in the said *Rivers*. *Tertio*, *Res universitatis*, which are common only to a *Corporation* or *City*, as a *Theater*, or the *Mercat-Place*, and the like. *Quarto*, Things that are said to be no *Man's*, but are *Juris Divini*, which are either *Sacred*, such as the *Bells of Churches*, for though we have no consecration of things since the *Reformation*, yet some things have a *Relative Holiness* and *Sanctity*, and so fall not under *Commerce*; that is to say, cannot be bought and sold by *Private Persons*. *Quinto*, Things that are called *sanctæ*;

ctæ; ſo called, becauſe they are *guarded from the injuries of Men*, by ſpecial *Sanctions*, as the *Walls of Cities*, *Perſons of Ambaſſadors*, and *Laws*. *Sexto*, Things *Religious*, ſuch as *Church-Yards*. Tit. I.

As to thoſe things which fall within *Commerce*, we may *acquire right to them*, either by the *Law of Nature and Nations*, or by our *Civil and Municipal Law*. *Dominion* or *Property* is acquired by the Law of Nations, either by our own *Fact and Deed*, or *Secundo*, by a *Connection* with, or *Dependence* upon *things* belonging to us; the firſt by a *general term* is called *Occupation*, and the laſt *Acceſſion*. Ways of acquiring Property.

Occupation, is the *appropriating and apprehending of thoſe things, which formerly belonged to none*. And thus we acquire *Property* in *wild Beaſts*, of which we acquire a *Right* how ſoon we *apprehend them*, or are in the *proſecution* of them with *probability* to *apprehend* them, as alſo we retain a *Right* to them whilſt they remain in *our poſſeſſion*, and even after they have eſcap'd, if they be yet *recoverable by us*. *Secundo*, Property comes by *Acceſſion*; as for *inſtance*, a *Houſe built* upon, or *Trees taking root in our Ground*, and the *Product* alſo of our Occupation. Acceſſion.

Book II. *Beasts* belong to us, and Ground that grows to our Ground becomes insensibly ours, and is called *Alluvio* by the *Civilians*. And it is a general Rule in Law, that *accessorium sequitur naturam sui principalis*; and yet a Picture drawn by a great Master upon another Man's Sheet or Table, belongs to the *Painter*, and not to the Master of that whereon it is drawn; the meanness of the one ceding to the excellency of the other.

There are many other ways of acquiring *Right* and *Property*, which may be referred either to *Occupation* or *Accession*; as if a Man should make a *Ship* of my *Wood*, it would become the *Maker's*, and would not belong to me to whom the Wood belonged: and this is called *Specification*, in which this is a general Rule, that *if the Species can be reduced to the rude mass of Matter, then the Owner of the Matter is also Owner of the Species, or thing made:* as, *if a Cup be made of another Man's Silver, the Cup belongs not to the Maker, but to the Owner of the Metal*; because it can be reduced to the first *mass of Silver:* but if it cannot be reduced, then the *Species* will undoubtedly belong to him that made it, and not to the *Owner of the Matter*; as *Wine* and

Specification.

Oil made of another's *Grapes* and *Olives*, which belongs to the *Maker*, ſeeing *Wine* cannot be reduced to the *Grapes of which it was made*. Tit. I.

Property is likewiſe acquired when two or more Perſons mix together in one what formerly belonged to them ſeverally; and if the *Materials mixed be liquid*, it is called by a ſpecial Name, *Confuſion*, as when ſeveral Perſons *Wines* are mixed and confounded together: but if the Particulars mixt be dry and ſolid, ſo as to retain their different Shapes and Forms, it is called *Commixtion*; and in both Caſes, if the *Confuſion* or *Commixtion* be by conſent of the *Owners*, the *Body* or Thing reſulting from it, is common to them all; but if the *Commixtion* be by chance, then if the Materials cannot be ſeparated, the thing is yet *common*; as when the *Grain* or *Corns* of two Perſons are mixed together by chance, here there muſt neceſſarily be a *Community*, becauſe *the ſeparation is impoſſible*: but if two *Flocks of Sheep* belonging to different Perſons, ſhould by accident mix together, there would be no *Community*; but every Man would retain right to his own *Flock*, ſeeing they can be diſtinctly known and ſeparated, and theſe two ways of *Acquiſition* are by *Acceſſion*. Confuſion. Commixtion.

Book II.

Tradition.

The last and most ordinary way of acquiring of Property is by *Tradition*, which is defined *a delivery of Possession by the true Owner, with a design to transfer the Property to the Receiver*; and this *translation* is made either by the real delivery of the thing it self, as of a *Horse*, a *Cup*, &c. or by a *Symbolick delivery*. As, is the *delivery of a little Earth and Stone in place of the Land it self:* For where the thing cannot be truly delivered, the Law allows some *Symbols* or *marks of Tradition*; and so far is *Tradition* necessary to the acquiring of the Property in such Cases, that he who gets the last Right with the *first Tradition* is still preferr'd by our Law.

Acquisitio per inventionem.

If he who was once *Proprietar*, does willingly quit his Right and throw it away, (which the *Civil Law* calls *pro derelicto habere*) the *first finder acquires a new Right, per inventionem*, or by finding it; by which way also Men acquire *Right to Treasures*, and *to Jewels* lying on the Shoar; and generally to all things that belonged formerly to no Man, or were thrown away by them: But it is a *general Rule* in *Our Law, that what belongs to no Man, is understood to belong to the King.*

Prescrip-

Tit. I.

Prescription.

Prescription is a chief way of *acquiring Rights* by the *Civil Law*; but because that *Title* comprehends many things, which cannot be here understood, I have treated of *Prescription* amongst the ways of losing Rights, it being upon divers Considerations, *Modus acquirendi & amittendi.*

Bona fides.

We also acquire right to the *Fruits* of those things which we possess, *bona fide*, if these Fruits were gathered in or uplifted, and consumed by us whilst we thought we had a good Right to the thing it self: for though thereafter our Right was found not to be good, yet the Law judged it unreasonable, to make us restore what we look'd upon as our own when we spent it; and therefore when this *bona fides* ceaseth, which may be several ways, especially by *intenting* an Action at the *true Owner's instance*, we become answerable for these *Fruits*; though thereafter they be *percepti & consumpti* by us.

TIT.

TIT. II.

Of the Difference betwixt Heritable and Moveable Rights.

HAving in the former Title *cleared how we acquire* Rights, *we come now to the Diviſion of them.*

The moſt comprehenſive *Diviſion of Rights* amongſt us, is that whereby they are divided into *Heritable* and *Moveable Rights.*

Heritable & moveable Rights.

Heritable Rights in a ſtrict ſenſe, are only *Lands*; and all Sums of Money, and other things which can be moved from one place to another, are *moveable:* but that is only counted *Heritable* in a *Legal Senſe*, which belongs to the *Heir*, as all other things which fall to the *Executor* are *moveable*; and ſo Sums of Money, albeit of their own nature they are *moveable*, yet if they were lent for *Annual Rent*, they were of old *reputed Heritable.*

Annual Rent.

For underſtanding whereof it is neceſſary to know, that albeit by the *Canon Law* all *Annual Rents* were forbidden, as being contrary to the Nature of the thing, (Money being barren of its own Nature:) yet the Reformed Churches do generally allow

allow it; nor were the *Jews* prohibited to take *Annual Rent* from *Strangers*. Tit. II.

Before the Year 1641. all *Bands* and *Sums* bearing *Annual Rent* were *heritable* as to all effects, ſo that the *Executor* who is *Hæres in mobilibus*, had no intereſt in, nor ſhare of ſuch Bands, but they belonged intirely to the *Heir*; but that *Parliament* finding that the reſt of the *Children* beſide the *Heir*, had no Proviſion by our Law, except an *equal ſhare* in the *Moveables*; they therefore ordain'd that all *Bands for Sums of Money ſhould be moveable, and ſo belong to the Executors; except either the Executors were ſecluded*, or the *Debitor were expreſly obliged to infeft the Creditor*, which is likewiſe renewed ſince the *King's Reſtauration* *: For in theſe caſes, it was clear, that by the *deſtination* of the *Defunct*, (which is the great *Teſt* in this Caſe) theſe *Sums* were to be *Heritable*; and yet all *Sums* bearing *Annual Rent*, are ſtill *heritable* in ſo far as concerns the *Fiſk*, or the *Relict*: ſo that if a *Band* bear *Annual Rent* to this day, the *Fiſk* cannot claim any right to it, as falling under the *Rebel's ſingle Eſcheat*, (whereby when he becomes *Rebel*, all his *Moveables fall to the King*;) nor has the *Relict* any Right to a *third*

Bands Heritable and Moveable.

* K. C. 2. Par. 1. Act 32.

Heritable quoad Fiſcum & Relictum.

Book II. *third of them*, as ſhe has to *a third of other Moveables*, the Law having preſumed that *Relicts* will be ſtill ſufficiently ſecured by their *Contracts*; but whether the *Sum be heritable* or *moveable*, all the *bygone Annual Rents*, and generally all *bygones* are *moveable* as to all intents and purpoſes, and ſo fall to *Executors*, and to the *Fisk*, and to the *Relict*; becauſe *bygone Reſts* are look'd on as Money lying by the Debitor, they being already payable, as all *Obligations* bearing a *tract of future* time belonging to the *Heir*.

So far does the Law defer to the will of the *Proprietar*, in regulating whether a *Sum* ſhould be *heritable* or *moveable*; (the *Law* thinking that every Man is *beſt Judge* how his *Eſtate* ſhould be beſtowed;) that if a Man *deſtinate a Sum* to be imployed upon *Land* or *Annual Rent*, this Deſtination will make it *heritable*, and to belong to his *Heir*; or though the Sum was originally ſecured by a *moveable Band*, yet it may become *heritable* by the *Creditor's* taking a *ſuperveening heritable ſecurity* for it, or by compriſing for his ſecurity. But yet the *Creditor's deſign* is more to be conſidered than the *ſupervenient Right*; as for inſtance, a Sum may be moveable *ex ſua natura*, and yet may

Sums Heritable by Deſtination.

may be ſecured by an *heritable Surety*; as in the Caſe of by-gone *Annual Rents*, due upon *Infeftment of Annual Rent*, which are unqueſtionably *moveable* of their own Nature, and yet they are *heritably* ſecured; and even *Executors* may recover them by a real Action of *Poynding* of the Ground. And, if a *Wedſet* bear a *Proviſion, that notwithſtanding of Requiſition, the Wedſet ſhall ſtill ſubſiſt*, the *requiſition* will make the Sum *moveable*, though it continue ſecured by the *Infeftment*; as alſo Sums *ab initio heritable*, may be ſecured by an *acceſſory moveable ſecurity*, without altering their Nature; as for inſtance, if one take a *Gift of ſingle Eſcheat* for ſecuring himſelf in *heritable* Sums, this does not alter the *Nature* of the former *heritable Right*. Tit. II.

Though a Sum be *heritable*, yet if the *Creditor* to whom it is due require his *Money*, either by a *charge* or *requiſition*, it becomes *moveable*; for the *Law* concludes in that caſe, that the *Creditor* deſigns rather to have his *Money*, than lying in the *Debitor's hands* upon the former ſecurity; and if it were lying in Money beſide him, it would be *moveable*: and a requiſition to one of the *Cautioners* will make it *moveable*, as to the *Principal* and

Book II. all the other *Cautioners*: But a charge on a *Band* wherein *Executors* are *secluded*, will not make the Sum *moveable*; *for the design of the Creditor is presumed to continue in favours of the Heir*, till the Sum be paid, or the *Band* innovated: And for the same reason, a requisition used by a *Wife*, who has an *heritable* Sum that falls not under the *Jus Mariti*, will not make it *moveable*, since it is presumed she designed only to get Payment, but not to give it to her *Husband*.

But if the *Creditor* who required his Money take *Annual Rent* after that *Requisition*, it is presum'd that he again altered his Inclination, and resolved to have it *heritable*, and to continue due by virtue of the first Security.

Though a *Band* be *heritable* as bearing *Annual Rent*, yet before the *Term of Payment* it is *moveable* as to all Persons.

From all which it is clear, that some Sums are *moveable* as to the *Executor*, but not as to the *Fisk* or *Relict*; and some may be *moveable*, as to the *Debitor* and his *Executors*, and yet may be *heritable* as to the *Creditor* and those representing him; as for *instance*, an *Obligation*, to *imploy a Sum* due by a *moveable Band*, upon

upon *Land* or *Annual Rent* for the *Heirs* of a *Marriage*, that Sum as to the *Creditor* would be *heritable*, yet *quoad* the *Debitor*, it would remain *moveable*. Tit. III.

TIT. III.

Of the Conſtitution of Heritable Rights, by Charters and Seaſins.

HAving treated in the former Chapter of the difference betwixt *Heritable and Moveable Rights*, it is now fit to begin with *Hereditable Rights*, as the more *Noble*.

Our *Heritable Rights* are *regulated* by the *Feudal Law*, by which *Feudum*, which we call a *Few*, was defined to be *a free and gratuitous Right to Lands made to one for Service to be performed by him*: He who grants this *Few*, is in *Our Law* called the *Superiour*; and he to whom it was granted, is called the *Vaſſal*: the *Superiour's Right* to the *Fie* is called *Dominium directum*, and the *Vaſſal's Right* is called *Dominium utile*; and if that *Vaſſal* diſpone the Land to be holden of *himſelf*, then that other *Perſon* who *receives* that *Few*, is called the *Sub-vaſſal*; whereas the

Feudum.

Superior & Vaſſal.

Dominium directum & utile.

Book II. Sub-vaſſal. the *Vaſſal* who granted the *Few*, becomes the immediate *Superiour* to this *Sub-vaſſal*, and the *Vaſſal's Superiour* becomes the *Sub-vaſſal's* mediate *Superiour*, and is ſo called becauſe there is another *Supeperiour interjected* betwixt him and the *Sub-vaſſal*.

The *Superiour* diſpones ordinarly this *Few* to be holden of him by a *Charter* and *Seaſin*: The *Charter* is in *effect* the *diſpoſition* of the *Few* made by the *Superiour* to the *Vaſſal*; and when it is firſt *granted Charter*, it is called an *Original Charter* or *Right*; and when it is renewed, it is called a *Right* by *Progreſs*, and proceeds either upon *Reſignation* when the Lands are *reſigned* in the *Superiour's* hands for *new Infeftment*, either in favours of the *Vaſſal* himſelf, or of ſome *third Party*, or by *Confirmation*, when the *Superiour* confirms the *Right* formerly granted; and if it is to be holden from the *Diſponer* of the Superiour, that is called *à me*, and is a publick Right, and is ſtill drawn back to the date of the Right confirmed: But if the *Confirmation* be only of *Rights* to be holden of the *Vaſſal*, it is called *de me*, and is a baſe Right, the effect of this *Charter* being to ſecure againſt *Forfaulture* or *Recognition* of the *Superiour*, all which

which are voluntar *Rights*; but if they be granted in obedience to a *Charge* upon *Appriſing* or *Adjudication*, they are neceſſar. Tit. III.

If the *Charter* contains a Clauſe *de novodamus*, then it has the Effect of an *Original Right*, and ſecures againſt all Caſualities due to the *Superiour*.

In *Charters*, the firſt thing expreſſed is for what Cauſe it was granted, and if it was granted for Love and Favour, *Our Law* calls that a *Lucrative Cauſe*, or for a Price, and good Deeds; this we call *an Onerous Cauſe*. Cauſe onerous and lucrative.

The ſecond thing conſiderable in a *Charter*, is *the diſpoſitive Clauſe* which contains the Lands that are diſponed; and *regularly* with us, the *Charter* will give Right to no Lands but what are contained in this Clauſe, though they be enumerated in other places of the Charter. Diſpoſitive Clauſe.

The third *Clauſe* is that wherein is expreſt the way how the Lands are to be holden of the *Superiour*, and this is called the *Tenendas*, from the firſt word of the *Clauſe*. Tenendas.

The fourth *Clauſe* is that which expreſſes what the *Vaſſal* is to pay to the *Superiour*, and this Duty is called the *Reddendo*, Reddendo.

Book II.

dendo, becauſe the *Clauſe* whereby it is payable begins, *Reddendo inde annuatim.*

Warrandice Perſonal and Real.

The fifth *Clauſe* is the *Clauſe of Warrandice*, which is either *Perſonal* or *Real*; *Perſonal Warrandice* is when the *Author* or *Diſponer* is *bound perſonally*, and is either *ſimple Warrandice*, which is only from *ſubſequent* and *future Deeds* of the *Granter*; and this *Warrandice* is implied in *pure Donations*. Or *Secundo*, *Warrandice* from *Fact* and *Deed*; which is, that the *Granter hath not done, or ſhall not do any Deed prejudicial to the Right warranted.* Or *Tertio*, *Warrandice is abſolute*, and that is, *to warrant againſt all Mortals*: and in abſolute *Warrandice*, this is a rule, that an *Adequate onerous Cauſe preſumes ſtill abſolute Warrandice*; but *abſolute Warrandice in Aſſignations* imports only that the *Debt is truely due, and not that the Debitor is ſolvent.*

Simple Warrandice.

Warrandice from Fact and Deed.

Abſolute Warrandice.

All Rights granted by the King are preſumed to be Donations, and import no Warrandice.

Real Warrandice.

Real Warrandice is when *Infeftment of one Tenement is given in ſecurity of another.*

The effect of Warrandice is, that if the thing warranted be taken away, there is competent to the Party, to whom

 the

the Warrandice is granted, an *Action of Eviction.* Tit. III.

As *Warrandice* infers *relief*, ſo *Excambion* infers *regreſs*; that is to ſay, the Party from whom the *excambed Lands* are evicted, either by a Deed of the *Excamber* or a defect of the Right, *has regreſs and recourſe to the Lands which he excambed with* the *Lands which are evicted*: And this ariſes from the nature of the *Excambion* without expreſs paction, and is *competent too, as well as againſt the ſingular Succeſſors of Excambers and their Heirs.*

Becauſe *Tradition* is requiſite to the compleating of all Rights; therefore the Charter contains a Command by the *Superiour* to his Baily; to give *actual State and Seaſin* to the *Vaſſal*, or to his *Attorney.* By *tradition of Earth and Stone*, and this is called the *Precept of Seaſin*, and upon it the *Vaſſal*, or ſome other Perſon, having a *Procuratory* from him, gets from the *Bailly Earth and Stone* delivered in preſence of a *Notar* and *two Witneſſes*, which *Inſtrument* is called a *Seaſin.* And if the *Superiour* gives *Seaſin* himſelf, it is called a *Seſin*, (*propriis manibus*;) ſo that a Formal *Seaſin is the Inſtrument of a Notar, bearing the delivery of Earth and Stone,*

Precept of Seaſin.

Seaſin.

Seaſin propriis manibus.

Book II. *Stone, or some other Symbols by the Superiour, or his Bailly to the Vassal*, or his *Atturney*: The Tenor whereof is known and fix'd, and now by a late *Statute the Witnesses must subscribe the Instrument* *; and thus the *Vassal* stands *Infeft* in the Land by *Charter* and *Seasin*.

* K. C. 2. Par. 3. Act. 5.

This *Seasin* being but the *Assertion of the Notar*, proves not; except the warrand of it; that is to say, the *Precept* or *Disposition* whereon it proceeded be produced; but a *Seasin* given by a *Husband* to his *Wife*, or by a *Superiour* to his *Vassal*, *propriis manibus* (without a *Precept*) is sufficient, when the *competition* is with the *Granter's* own *Heirs*, or with no more *solemn Rights*; and is not exorbitant, and after 40 *Years* there is no necessity to produce either *Precept* of *Seasin*, or *Procuratory* of *Resignation* by a special *Statute* *.

* K. J. 6. Par. 14. Act 214.

This *Seasin* must be regiſtrated within 60 days, either in the general *Regiſter* at *Edinburgh*, or in the particular *Regiſter* of the *Shire*, *Stewartry*, or *Regality* where the Land lyes, † else the Right will not be Valid againſt a *ſingular Succeſſor*; that is to say, if any other Perſon Buy the Land, he will not be obliged to take notice of that *Seasin*; but the Right

† K. J. 6. Par. 23. Act 16.

Right will still be good against the Granter and his *Heirs*. Tit. III.

If *Lands* lye *Discontigue*, every *Tenement* must have a special *Seasin*, except they be *united* in one *Tenement*, and then one *Seasin* serves for all; if there be a special place express'd where *Seasin* should be taken; but if there be no place express'd, then a *Seasin* upon any part will be sufficient for the whole *Contiguous Tenements*, (these being naturally united;) but will not be sufficient for Lands, lying *discontigue*: And one *Seasin* will serve for all *Tenements* of one kind, but where they are of several kinds, as Lands, Milns, or holden of different Superiours, or by a different holding of the same Superiour, these (though *contiguous*) will require several *Seasins*: The *Symbols* of Possession being different, for Lands pass by the *Tradition* of *Earth* and *Stone*, and *Milns* by the *clap* and *happour*.

Sometimes *Lands* are erected into a *Barrony*, (the nature of which is explained before, *Tit. Inferiour Judges*) and whensoever this is granted, *Union* is implied as the lesser degree. Erection in a Barrony.

Erection in a *Barrony* can only be by the *King*, and is not *Communicable* by any *Subaltern Rights*, albeit the whole

Book II. *Barrony* be disponed, though the *Union* may be thereby *Communicated*.

This *Union* can only be granted by the *King*, which he may grant either *Originally*, or by *Confirmation*; and being so granted, it may be *transmitted* by the *Receiver* to a *Sub-Vassal*; but if a part of the Lands united be disponed, the whole Union is not dissolved, but the Part disponed only; and this *Union* and all other Privileges and Provisions can only be granted in the *Charter*, but not in the *Seasin*.

Real Rights being thus established by *Charter* and *Seasin*, are not affected or burdened by *Back Bands*, or other personal Declarations; so that singular Successors are not obliged to take notice of them; but till they are so compleated, such Declarations (though personal) do affect them, and are valid against singular Successours: But they affect personal Rights, such as *Bonds* or *Contracts*, even though they be not intimated.

TIT.

TIT. IV.

Of the ſeveral Kinds of Holding.

THE firſt *Diviſion* of *Feus* from the *ſeveral kinds of Holding*, is, that ſome Lands hold *Ward*, ſome *Feu*, ſome *Blench*, and ſome *Burgage*. Diviſion of Feus.

For underſtanding *Ward-holdings*, it is fit to know, that at firſt all *Feus* were Rights granted by the *Longobards*, and the other *Northern Nations* (when they conquer'd *Italy*) to their own Souldiers for Service to be done in the *Wars*; and therefore *Ward-holding*, which is the *propereſt Holding*, is called *ſervitium militare*; and all Lands are therefore preſumed to hold *Ward*, except another holding be expreſs'd; and *ſervitium debitum & conſuetum*, is interpreted to be *Ward-holding*. Ward.

The Advantages ariſing to the *Superiour* by the *ſpecialty of this Holding* are, that the *Superiour* has thereby the full *Meals* and Duties of the *Ward Lands*, during the Years that his *Male-Vaſſal* is *Minor* *; for the *Feu* being given originally to the *Vaſſal* for *Military Service*, it

* Q. Mary Par. 3. Act 5. K. Ja. 6. Par. 2. Act 42.

Book II. it returns to the *Superiour* during *Minority*; becauſe the Law preſumes, that the *Minor* is not able to ſerve his *Superiour* in the *Wars*; but in *Female Vaſſals*, this *Caſuality* laſts only till 14 *Years compleat*; becauſe they may then *marry Husbands*, who may be able to ſerve the *Superiour*, and this properly is called the *Caſuality of Ward*: *for Marriage*, is due in other *Holdings*, as ſhall be cleared in the next *Title*.

Sometimes the *Superiour* is content to accept a *liquid quota*, or *annual preſtation*, in place of the Meals and Duties that fall to him by the *Ward*, and this Holding is called *Taxt-ward*: The Marriage is alſo taxt in that Caſe to a particular Sum; but though theſe Taxt-ward and Taxt-marriage Duties become *debita fundi*, they being expreſs'd in the *Reddendo*; yet becauſe the Holding remains ſtill a *Ward-holding*, therefore Lands holding *Taxt-ward* recognoſce, if they be diſponed without conſent of the Superiour. When a *Vaſſal* holds immediately *Ward* of the *King*, and a *Sub-vaſſal* holds *Ward* of that *Vaſſal*, this is calld *Black Ward*, or *Ward* upon *Ward*.

Feu-holding. *Feu-holdings* is that whereby the *Vaſſal* is obliged to pay to the Superiour a *Sum of*

of Money yearly, in name of *Feu dutie nomine Feudi firmæ.* Tit. IV.

This Holding has ſome *Reſemblance* with the [*Emphyteoſis*] in the *Roman Law*, but it is not the ſame with it; for *Emphyteoſis* was a perpetual *Location*, containing a Penſion, as the *hire* which was granted, for *improving* and *cultivating barren Ground*; but our *Feu-holding* comes from the *Feudal Law*, (whereof there is no veſtige in the *Civil Law*) and paſſes by *Infeftment* to *Heirs*. Emphyteoſis.

Blench-holding, is that whereby the *Vaſſal* is to pay an *Eluſory Duty*, meerly for acknowledgment, as a *Penny*, or a *pair of Gloves*, *nomine albæ firmæ*, and ordinarly it bears, *ſi petatur tantum*. Blench-holding.

Theſe *Blench Duties* are not due, whether they be of a *yearly growth*, or not, except they be required *yearly* by the *Superiour* *, as for inſtance, if the *Blench Duty be yearly Attendance at ſuch a Place, or a Roſe yearly, the Superiour can ſeek nothing for his Blench Duties, except he required the ſame within the Year*: But the *Exchequer* now puts a Value upon every *Blench Duty* that can be eſtimated, ſuch as *Gloves* or *Spurs*, and exacts them for all by-gone Years within *Preſcription*; though

* K. Ja. 6. Par. 18. Act 14.

Book II.

Burgage-holding.

though they be not required yearly.

Burgage-holding, is that *Duty* which *Burghs Royal* are obliged to pay to the *King*, by the *Charters*, *erecting them in a Burgh Royal*, and in this the *Burgh* is the *Vassal*, and not the particular *Burgesses*; and the *Bailiffs* of the *Burgh* are the *Kings Bailiffs*: nor can *Seasin* in *Burgage Lands* be given by any other than the *Baily*, and *Town-Clerk* *, if the *Town* have any, and they must be *Registrated* in the *Town-Clerk's Books* †.

* K. J. 6. Par. 1. Act 27.

† K. C. 2. Par. 3. Act 11.

Mortification.

When Lands are Mortified (which we call *ad manum mortuam*) to Churches, Hospitals, or other Pious Uses; the Society to which the Mortification is made, becomes *Vassal*, and the *Reddendo* being only *Preces & Lachrymæ*, and the Society never dying, the Superiour loses many Casualities of the Superiority; wherefore Lands cannot be mortified without the Superiour's consent.

TIT.

TIT. V.

Of the Caſualities due to the Superiour.

THE *Feu* being thus ſtated by the *Superiour* in the *Perſon of his Vaſſal*, it will be fit in the next place, to conſider what Right the *Superiour retains*, and what Right the *Vaſſal acquires* by this *Conſtitution of the Feu*.

The *Superiour* retains ſtill *dominium directum* in the *Feu*, and the *Vaſſal* has only *dominium utile*, and therefore the *Superiour* is ſtill infeft as well as the *Vaſſal*; But the *King* needs not be infeft, for he is infeft *jure Coronæ* in all the Lands of *Scotland*; that is to ſay, his being *King is equivalent to an Infeftment*.

The Superiour has different Advantages and Rights, according to the different manner of *Holdings*; and there are ſome Rights and Caſualities common to all *Holdings*.

Ward-holdings gives the *Superiour* a Right to the Meals and Duties of his *Vaſſal's Lands*, during all the Years that his *Vaſſal* is *Minor*; and this is properly called the *Caſuality of Ward*; but the *Superiour*

Book II. *Superiour* or his *Donatar* are obliged to entertain the *Heir*, if he have no other *Feu* or *Blench Lands*, and to uphold the Houſe, Parks, *&c.* in as good condition as they found them; and muſt find Caution for that Effect *.

* K. J. 4. Par. 3. A&. 25. K. Ja. 5. Par. 4. A&. 15.

If the *Vaſſal* ſells or diſpones the half of his *Ward-Lands* to any except his *appearand Heir*, who is *alioqui ſucceſſurus*, without the conſent of his *Superiour*, the whole *Ward-Lands* fall to the *Superiour for ever*; and this we call * *Recognition*, which is introduced to puniſh the ingratitude of the *Vaſſal*, who ſhould not have *diſponed* the Lands which is *preſumed he got gratuitouſly from the Superiour* without his own conſent; and to ſhun this, the *Vaſſal* in *Ward-Lands* gets the *Superiour's Confirmation* before he takes *Infeftment*; for if he take *Infeftment* before he be confirmed, the *Land's recognoſce*, as ſaid is; ſince the *Vaſſal* ſhows ſufficiently his ingratitude by the very taking of the *Infeftment*. But if the *Seaſin* be null in it ſelf, it infers no *Recognition*; becauſe in that caſe there is no Right tranſmitted.

Recognition. * Statuta Rob. 3. cap. 19.

And though the *Vaſſal* at firſt did not ſell the half without the *Superiour's* conſent; yet, if he thereafter ſells as much as

as will extend to more than the half of the *Feu*, the *first Buyer* will likewiſe loſe his *Right*, if it was not *Confirmed* before he took *Infeftment*. And this holds even where the Lands are but *Wadſet*, though the *Back-Tack Duty* does not extend to the equal half of the value of the Lands, if the Lands *Wadſet* exceed the major part of the Tenement: But *alienation* of Teinds, infers not this *Caſuality*, becauſe they are not *holdenward*. Tit. V.

Not only a *Confirmation* or *Novadamus*, if it expreſs *Recognition*; but the *Superiour* accepting *Service*, or purſuing for the *Caſualities*, or accepting right from the *Vaſſal* poſterior to the Deeds inferring *Recognition*, are a paſſing from the *Recognition*, becauſe they infer the *Superiour's* Acknowledgment of the *Vaſſal's Right*. And *Inhibition* raiſed and executed before the *Recognition* be incurred, ſecures againſt the ſame by a late *Statute* *. Novadamus.

* K. Ja. 7. Par. 1. Act 4.

Recognition takes place in *Taxt-Ward* as well as *Simple-Ward*, but in no other manner of Holding, except the ſame be expreſly provided in the *Vaſſal's Charter*, for *Ward-holding* is preſumed to be the only proper *Feudal Right*.

If

Book II.

Disclamation.

If the *Vassal* denieth the *Superiour*, he loses his *Feu*, and this is called *Disclamation* * ; but any probable ground of *Ignorance* will take off this *Forfeiture*.

* Statuta Rob. 3. cap. 18. Reg. Majest. lib. 2. cap. 63. Par. 6. Act 9.

If the *Vassal* who holds *Ward-Lands* dies, having an *Heir Unmarried*, whether *minor*, or *major*, the *Superiour* gets the value of his *Tocher*, though he offer him not a *Woman* to be his *Wife* ; but if the *Superiour* offer him his *Equal* for a *Wife*, and he refuses to accept her, and Marries any other Person ; the *Superiour* gets the double of his *Tocher*, and one of these *Casualities* is called the *single Avail of the Marriage*, and the other the *double Avail of the Marriage* ; but the *Modification* of this is referr'd to the *Lords of Session*, who consider still what was the *Vassal's free Rent*, all Debts deduced, and the *ordinary Modification* of the *single Avail* is about two *Years Rent* of the *Vassal's free Estate*, even though the *Heir* was *Heretrix* ; and the *double Avail* is but a Year more, which is three *Years free Rent* : And though there were moe *Heirs Portioners*, there will only one *Avail be due for them all*.

Avail of the Marriage.

The single and double Avail of the Marriage.

Though this *Casuality* of *Marriage* be still due in all *Ward-holdings*, yet they may be due by *expres Paction* in other *Holdings*,

Holdings, and there are many in *Scotland* who hold their *Lands Feu, cum maritagio*; and in both Cases, the *Marriage* is *debitum fundi*. Tit. V.

Though as to the *Casuality* of *Ward*, every *Superiour* has Right to the *Ward-Lands holding* of himself where the *Vassal* holds *Ward-Lands* of moe *Superiours*; yet the *Casuality* of Marriage falls only to the *eldest Superiour*, because there cannot be more Tochers than one, and he is the *eldest Superiour* from whom the *Vassal* had the first *Feu*; but the *King* is still presumed to be the *eldest Superiour*, because all *Feus* originally flowed from him.

It is thought that the Reason why this *Casuality* is *due*, was because it was not Just that the *Vassal* should bring in a Stranger to be *Mistress of the Feu*, without the *Superiour's consent*; for else he might choice a *Wife* out of a Family that were an Enemy to the *Superiour*; but I rather think that both *Ward* and *Marriage*, proceeded from an *express Paction* betwixt King *Malcome Kenmure* and his Subjects, when he first *feued* out the whole *Lands* of *Scotland* amongst them; as is to be seen in the first of his *Statutes* *. * Leg. Malcol. cap. 1.

The

Book II.

Feu Duty.

The special Duty arising to the *Superiour* in a *Feu-holding* is, that the *Superiour* gets a *yearly Feu Duty* payed to him, and if no part of this *Feu Duty* be payed for three Years, then the *Vassal* loses his *Feu*, *ob non solutum Canonem*; for the *Feu Duty* is called *Canon*; and if this Provision be express'd in his *Charter*, he will not be allowed to Purge this *Irritancy*, by offering the by-gones at the *Bar*; but though this *Provision* be not express'd in the *Charter*, yet the *Feu* will be annulled for not payment of the *Feu-duty*, by an express Act of Parliament *; but the *Vassal* in that Case will be allowed to purge at the *Bar*, and the reason of this difference is, because the *express Paction* is thought a stronger Tye than the *meer Statute*.

* K. J. 6. Par. 15. Act 246.

Clause irritant.

A *Clause irritant* in *our Law*, signifies any *Provision* which makes a *Penalty* to be incurred, and the *Obligation* to be null for the future; as where the *Superiour* gives out his *Feu* upon *express Condition*, that if the *Feu-duty* be not payed, the *Feu* shall be *null* and *reduceable*, and a *Clause resolutive* is a *Provision* whereby the *Contract* to which it is affix'd, is for not *Performance*, declared to have been *null* from the beginning.

Clause resolutive.

The

Tit. V.

The *Caſualities* that are due by all manner of *Holdings*, and which ariſe from the very *Nature of the Fue*, without any *expreſs Paction*, are *None-entry*, *Relief*, and *Life-rent Eſcheat*.

None-entry.

None-entry, is a *Caſuality* whereby the *Superiour* has Right to the Meals and Duties of the Lands, when there is not a *Vaſſal* actually entered to the Lands, or where the *Vaſſal's* Right is reduced after he is entered; and the reaſon why this is due to him, is, becauſe he having given out his *Feu* to his *Vaſſal* for Service, when there is no *Vaſſal* entered, the Law allows him to have recourſe to his own *Feu*, that he may therewith provide himſelf a *Vaſſal* who may ſerve him: but though the full Rents of the Lands be due to the *Superiour*, from the very time that he cites his *Vaſſal* to *hear* and *ſee* it found and declared, that the Lands are in *None-entry*; yet before that *Citation*, the *Superiour* gets only the *Retoured Duties*; and the reaſon of the difference is, becauſe after *Citation* there is a greater contempt than before, and ſo is to be more ſeverely puniſhed.

Retoured Duty.

For underſtanding which *retoured Duty*, it is fit to know, that there was of old a *general valuation* of all the *Lands*

Book II. of *Scotland*; but thereafter there was a *new valuation*, the first whereof is called *the old*, and the second *the new Extent*, and both are call'd the *retour'd Duty*, because they are express'd in the *Retour* (or *Return*) that is made to the *Chancellary* when an *Heir is served*; but both are very far below the *Value*, to which Lands are now improved, though in *Our Law* the *new Extent* be constructed to be the value: But if the Lands be not retoured, the Donatar to the *None-entry*, will have Right to the full Meals and Duties even before Citation: The *old Extent* is said to be made *tempore pacis*, and the *new Extent tempore belli*; and the most probable reason of these *terms* is, that the first *Valuation* was very mean, being made in time of Peace: But our *Kings* being engag'd thereafter in War with the *English*, there was a new Valuation made much greater than the first, to augment the *Revenue* for maintenance of the *War*: And therefore the new Extent or Valuation is said to be made *tempore belli*.

But in an *Infeftment of Annual Rent*, the whole *Annual Rent* is due, as well before *Declarator*, as after; because the whole *Annual Rent* is the *retoured Duty*, it being *retoured*, *valere seipsum*; and that

that is called *an Infeftment of Annual Rent*, when the *Vaſſal* is not infeft in the *Property* of the particular *Lands*; but is infeft in an *yearly annuity of Money* to be paid out of the *Lands*; as for inſtance, if a Man ſhould be infeft in the Sum of *Five hundred Merks yearly*, to be payable out of any particular *Lands*, being worth 500 Merks yearly, how ſoon the *Vaſſal* who had right to the 500 Merks died, the *Superiour* would have right to the whole *Annual Rent* yearly, until the Heir of the *Vaſſal* be entered. *Vide infra Tit. Redeemable Rights*, §. *Annual Rents*. Tit. V. Infeftment of Annual Rent.

There is no *None-entry* due in *Burgage Lands*; becauſe the *Burgh* it ſelf is *Vaſſal* and never dies; and ſo therefore neither does the *Burgh* nor any private *Burgeſs* pay *None-entry*, the Duty payable by the *Burgeſſes* being only *Watching* and *Warding*: And yet their Life-rent, as well as *ſingle Eſcheats*, falls to the *King*. The *None-entry* ſubſequent to the *Ward*, is of the nature of the *Ward*; and if the *Superiour* or *Donatar* were in poſſeſſion, they have right to the full *Meals* and *Duties* without any *Declarator*; but in that caſe the *Donatar's Right* extends only to three *Terms ſubſequent* to the *Ward*,

Book II. after which there is place to a *Second Donatar*.

When the *Vassal* enters, he pays an acknowledgment to the *Superiour*, which is called *Relief*; becauſe it's payed for relieving his *Land* out of the *Superiour's hands*. It is *debitum fundi*, and affects not only the *Ground really*, but the *Vassal personally*, who takes out the Precept for infefting himſelf; though he never takes *Infeftment* thereupon.

Relief.

The value of this *Casuality* varies, according to the nature of the Holding; for in *Blench* and *Feu-holdings*, it is only the double of the *Feu* or *Blench-duties*; but in *Ward-holdings*, it is the full Duty of the Land, if the *Superiour* be in poſſeſſion the time of the *Vassal's entry*; but if the *Superiour* was not in *poſſeſſion*, even though the *Vassal* was *minor*, then the *Superiour* gets only the *retoured* Duty; and it is ſo far from being preſumed to be *remitted* by the *Superiour's* entering his *Vassal*, that it is ſtill exacted by the *Exchequer*, though it be gifted with the other *Casualities*.

Life-rent Eſcheat.

For underſtanding *Life-rent Eſcheats*, it is fit to know, that when any Man does not pay a *Debt*, or perform a *Deed* conform to his *Obligation*, his *Obligation* is *regi-*

regiſtrated; if it carry a *Conſent* to the *Regiſtration* in the Body of it, or if it do not, there muſt be a *Sentence recovered*, and upon that *Regiſtrated Writ* or *Decreet* (for a *Regiſtrated Writ* is a *Decreet* in the *Conſtruction of Law*) there will be *Letters of Horning* raiſed, and the *Party* will be charged; and if he pay not within the days allowed by the *Charge*, he will be *denounced Rebel*, and put to the *Horn*, and from the very date of the *Denunciation*, all his *Moveables fall to the King by a Caſuality*, which is called *ſingle Eſcheat*; but now ſingle *Eſcheats* fall likewiſe to *Lords of Regalities*, if the Perſons *denounced* live within a *Regality*; becauſe the *King* uſes to gift all ſingle *Eſcheats* at the Erection: But if they be not expreſly gifted, they remain with the *King*. Tit. V. Single Eſcheats.

Under the ſingle *Eſcheat* fall all Sums that are moveable *quoad Fiſcum*, and all by-gone Annual Rents even of heritable Sums, and the by-gone Rents of Lands, together with the Crop that is upon the Ground the time of the *Rebellion*, and the Meals and Duties due at the Term, immediately ſubſequent to the *Rebellion*.

If the *Vaſſal* continue year and day *Rebel*, without *relaxing* himſelf, (which

Book II. Relaxation.

Relaxation is expeded by *Letters* under the *King's Signet*, expreſly ordaining him to be *relaxed from the Rebellion*) then he is eſteemed as *civilly dead*; and conſequently not being able to ſerve the *Superiour*, the Law gives the *Superiour* the *Meals* and *Duties* of his *Feu*, during all the days of the *Vaſſal*'s life; and this *Caſuality* is called *Life-rent Eſcheat*: ſo that every *Superiour* as well as the *King*, has right to the Meals and Duties of the Lands holden of himſelf * if his *Vaſſal* was once inſeſt; and even though he was not inſeſt, if he was *appearand Heir*, and might have been inſeſt, for his lying out ſhould not prejudg his *Superiour*; but if a Man have Right by Diſpoſition, whereupon no Inſeftment followed, the *King* only will have Right to his *Life-rent Eſcheat*, ſince the *ſingular Succeſſour* not being yet inſeſt by the *Superiour*, of whom he is to hold his Lands, that *Superiour* cannot have Right, and *conſequently* their *Life-rent* falls to the King; and the *Life-rent* of Miniſters, in ſo far as concerns their *Manſes* and *Gleibs*, falls alſo to the *King*, becauſe they require no Inſeftment, and are not holden of any other *Superiour*: but all *heritable* and *Life-rent Rights* requiring no Inſeftment

* K. Ja. 5. Par. 4. Act 33.

of

of their own Nature, ſuch as a *Terce*, and *Life-rent-tacks*, fall not to the *King*, and *Life-rent-tacks* fall to the *Maſter of the Ground*, and the *Life-rent* by *Terce* pertains to the *Superiour* during the *Life-renter's* life-time *. Tit. V.

*K. J 6. Par. 22. Act 15.

This *Life-rent Eſcheat* comprehends only *Rights*, to which the *Vaſſal* himſelf had right for his *Life-time*, for elſe it will fall under *ſingle Eſcheat*, (*ſingle Eſcheats* comprehending every thing that is not a *Life-rent Eſcheat*) and therefore if the *Superiour* having Right to the *Vaſſal's Life-rent Eſcheat*, become *Rebel* himſelf, the *Vaſſal's Life-rent Eſcheat* will fall under the *Superiour's ſingle Eſcheat*, for the *Superiour* had not Right to thoſe *Meals* and *Duties* during all the days of his own *Life-time*; and ſo it could not fall under his *Life-rent*: and the like does for the ſame reaſon hold in all ſuch as have Aſſignations to *Life-rents*, or to *Life-rent Eſcheats*, or to *Tacks* for any definite number of Years, few or many.

The *Superiour* has alſo Right to the *Sub-vaſſal's Life-rent Eſcheat*, which falls after the *Vaſſal's Denunciation*; for by the *Denunciation of the immediate Vaſſal*, the *Superiour* comes in his place, and

Book II. so has Right to the *Sub-vassal's Life-rent*: But if the *Sub-vassal* be first *denounced*, his *Life-rent* falls under the *Vassal's single Escheat*.

The *Life-rent Escheat* falls by the *Rebellion*, that is to say, by the *Denunciation*; and the Year and Day is given only to the *Rebel* to *relax himself*; so that if he *relax* not within that time, his *Life-rent* will *fall from the Denounciation*.

In Competitions betwixt the *Superiour* or the *Donatar*, and the *Rebel's Creditors*, these Rules are observed in our Divisions: First, as to *single Escheats*, (which must be treated here, for their Contingency with *Life-rent Escheats*, though *single Escheats* fall not to the *King* as *Superiour*, but as *King*.)

No *legal Diligences* nor voluntar Rights, for Payment of any Debt contracted after *Rebellion*, will prejudg the *King* or his *Donatar*; since otherwise a *Rebel* at the *Horn* might fraudulently contract Debt to evacuate the *Escheat*.

2°. If a Lawful *Creditor* for a *Debt prior* to the *Rebellion*, compleat his diligence before *Declarator*, he will be preferred to the *Donatar*.

3°. No *Voluntar Assignation*, (though for a *Debt prior* to the *Rebellion*) if granted

granted after *Rebellion*, and compleated by intimation before *Declarator*, will be preferred to the *Donatar*; but actual Payment will be preferred, if the Debt was *prior* to the *Rebellion*, and the Payment obtained before *Declarator*. As to *Liferent Eſcheats*, the Rules in Competitions run thus. Tit. V.

Primo, Though the Debt was *prior* to the *Denunciation*, no voluntar Infeftment will prejudg the *Superiour*; except the *Rebel* was obliged *prior* to the *Rebellion*, to grant that Infeftment, and that the Infeftment it ſelf was expired within Year and Day of the *Denunciation*.

Secundo, Though *legal Diligence* be more favourable than *voluntar Rights*, becauſe there is leſs *Colluſion*, yet no *legal Diligence* will be preferred to the *Superiour*, except it was led for a *Debt prior* to the *Denunciation*, and was compleated by Infeftment or Charge, or that a Signature was preſented to the Exchequer (which in Lands holding of the *King*, is equivalent to a Charge, ſince the *King* cannot be charged) within Year and Day thereof; albeit the ſaid *legal Diligence* was deduced after the *Denunciation*.

Though

Though this be the Courſe in Competitions, *quoad Life-rent Eſcheats*; yet actual Payment made to, or Diligences done by Creditors for Payment of Debts, prior to the *Rebellion*, or the commiſſion of Crimes, will be preferred to the *Donatar*; if theſe *Rights* or *Diligences* be compleated before *Declarator*, which we owe rather to the benignity of our *Kings*, than to the Nature of theſe Rights, ſince there is *jus queſitum Fiſco*, by the *Denunciation*.

Life-rent Eſcheats is proper to all kinds of Holding, except *Burgage* and *Mortification*; for the *Vaſſal* being a *Society* or *Incorporation* dies not, and ſo can have no *Life-rent Eſcheat*; and albeit the *Adminiſtrators* were *denounced* for *Debts* due by the *Incorporation*, yet that is ſtill preſumed to be their *Negligence*, which ought not to prejudge the *Society*.

For compleating this *Caſuality*, a general *Declarator* muſt be raiſed at the *Superiour* or *Donatar's* inſtance, to hear and ſee it found and declared, that the *Vaſſal* was orderly denounced *Rebel*, and has continued at the *Horn* Year and Day: And in Competitions betwixt *Donatars* the laſt Gift, if firſt declared, will be preferred. If

If the Gift be taken to the behove of the *Rebel*, it is null; and it is presumed to be to his behove, if he or his Family be suffered to stay in Possession; or if the Gift be procured by the *Rebel's means*.

It is observable in *Temporary Casualities*, such as *Ward*, *None-entry*, and in all Consolidations of the Property, with the *Superiority*, such as *Recognitions*, *Bastardies*, *Ultimus hæres*, the *Feu* returns to the *Superiour*, burdened with all *real Rights*, to which he has consented by Confirmation or otherwise: And with all these Rights which the Law hath established, without either Paction of Party, or consent of *Superiour*, such as *Terce* and *Courtesy*; and therefore such Rights do in both cases defend against the *Superiour*: But when the *Lands* return to the *King by Forefaulture*, His Majesty is not obliged to acknowledg either *Terce* or *Courtesy*, or any other Right but what himself hath actually confirmed; and both the *King* and other *Superiours* have no more Right by *Life-rent Escheat* than the *Vassal* himself had formerly, since they come only in the *Vassal's* Place, who by his *Rebellion* is rendered incapable to serve the *Superiour*.

When

Book II. When theſe *Caſualities* are gifted by the *King*, the Writ by which they are tranſmitted, is called a *Signature*, (as all other Writs are which paſs his *Majeſty's* Hand) and they are ſo called becauſe they are *ſigned* by him: And they muſt be written by Writers to the *Signet*, and paſs the *Signet*.

If theſe *Signatures* contain only *Temporary Caſualities*, ſuch as Gifts of *Ward*, *Marriage*, *Eſcheat*, &c. or only a Right to *Moveables*, they paſs only the *Privy Seal*; for what Right Subjects tranſmit by *Aſſignations*, his *Majeſty* tranſmits by the *Privy Seal*: But if the Right require a *Formal Diſpoſition*, and to be compleated by *Inſeftment*, it muſt be tranſmitted under the *Great Seal*, and the *Signatures* ought to expreſs what *Seals* they ſhould paſs. All great *Offices* and *Commiſſions* to *Judicatures* ſhould likewiſe paſs the *Great Seal*; except it be otherwiſe provided by Law, as Commiſſions of *Juſticiary*, which by Act of *Parliament* are allowed only to paſs the *Quarter Seal*.

This *Quarter Seal* was originally invented for ſealing *Writs*, which firſt paſſed the *Great Seal*, as Precepts of *ſeizing* upon *Charters* paſt the *Great Seal*. And

is therefore called the *Teſtimonial* of the *Great Seal*, and the ſhape of it is the fourth part of the *Great Seal*. The *Great Seal* contains virtually the *Privy Seal*; and therefore, though when a Man is forfeited, the Right of his Moveables ſhould be tranſmitted by a Right under the *Privy Seal*, and the Right of his Lands under the *Great Seal*; yet the Lords have found that the Right of the Moveables may be tranſmitted in the ſame *Signature* with the Lands, if the Moveables be therein expreſly diſponed and aſſigned. Tit. V.

Theſe *Seals* were invented to be Checks upon ſuch as obtain'd Gifts from the *King* by *Subreption* or *Obreption*; that is to ſay, by concealing what is true, or expreſſing what is falſe: For even after the *Signature* is paſs'd the *King's* Hand, it may be ſtopt in theſe Caſes.

The laſt Privilege of the *Superiour* is, that he may *force his Vaſſal to exhibit his Evidents*, to the end he may know what is the *nature of the Holding*, and in what he is *liable to him as his Superiour*, which proceeds ordinarly by an *Action of Improbation*; whereby he will be forced to exhibit, and produce his Evidents to ſhun the hazard of the Certification in the *Improbation*.

TIT.

TIT. VI.

Of the Right which the Vaſſal acquires by getting the Feu.

THe *Vaſſal* by getting the *Feu* ſettled in his Perſon, by *Charter and Seaſin*, as ſaid is, has Right to all Houſes, Caſtles, Towers, (but not Fortilaces) Woods, and other things that are above Ground of the Lands expreſly *diſponed*; and to Coals, Lime-ſtone, and other things within Ground, and to whatever has been *poſſeſſed*, as *part* and *pertinent* of the Land *paſt Memory of Man*: But there are ſome things which paſs not under the *general diſpoſitive words*, and require a *ſpecial Diſpoſition*, which belongs to the *King* in an eminent way, and are called therefore *Regalia*, and are not preſumed to have been *diſponed* by his *Majeſty* or any other *Superiour*; except they were *ſpecially mentioned*; ſuch as are all *Juriſdictions*, Forreſts, Salmon-fiſhings, Treaſures hid within the Ground, and Gold, Silver, and Fine Lead; for other Mines, ſuch as Iron, Copper, *&c.* belong to the *Vaſſal* *.

Regalia.

* K. Ja. 1. Par. 1. Act 12.

If

If Lands be erected in a *Barrony* by the *King*, then though the Lands lye *diſcontiguouſly*, one *Seaſin* will ſerve for them all; becauſe a *Barrony* implies an *Union*. Tit. VI.

This erecting them in a *Barrony*, will likewiſe carry a Right to *Juriſdictions*, and *Courts*, *Fortilaces*, *Forreſts*, hunting of *Deer*, and Ports, with their ſmall Cuſtoms granted by the *King*, for upholding theſe Ports, Milns, Salmon-fiſhings, *&c.* becauſe *Barronia eſt nomen univerſitatis*, and poſſeſſion of any part of a *Barrony* is reputed poſſeſſion of the whole: But Mines of Gold and Silver, * Treaſures, and Goods confiſcated, are not carried with the *Barrony*. * K. Ja. 1. Par. 1. Act 12.

The *Heritor* has alſo Power to ſet *Tacks*, remove and put in *Tenants*, as a conſequence of his Property.

A *Tack is a Location or Contract, whereby the uſe of any thing is ſet to the Tacksman for a certain hire*; and in *Our Law* it requires neceſſarly, that the *terms* of the *Entry*, and the *Iſh*, muſt be expreſs'd, that is to ſay, when it ſhould begin and end, and it muſt bear a particular Duty, elſe it is null; and if it be a *valid Tack*, that is to ſay, if *Writ* be *adhibited*, (*verbal Tacks* being only *valid* Tack.

for

Book II. for one Year) and the thing ſet, the *Contracters Names*, *Tack-duty*, *Iſh* and *Entry*, clearly therein expreſs'd, and clothed with *Poſſeſſion*, it will defend the poor *Tacksman* againſt any *Buyer* *; which was *introduced in favours of Poor Tenants*, for encouraging them to improve the *Land*: but it will not defend againſt *a Superiour of Ward-Lands*, *for the Ward*, &c. though by *Act of Parliament* the *Superiour* be obliged to continue them in their *Poſſeſſion* till the next *Term of Whitſunday* †.

*K. J. 2. Par. 6. Act 17.

†K. J. 4. Par. 3. Act 26.

Albeit *Tacks* have not all the *Solemnities* aforeſaid; yet they are *valid* againſt the *Granter* and his *Heirs*.

Tenants cannot aſſign their *Tacks*, except they be *Life-rent Tacks*, or that the *Tack* bear a Power to *aſſign*; but they may be compriſed or *adjudged*: and if the *Maſter* ſuffer the *Tacksman* to continue after the *Tack* is expired, he will be obliged to pay no more than he payed formerly during the *Tack*; and this is called in *Our Law* the benefit of a *tacite Relocation*, that is to ſay, both the *Setter* and the *Tacksman*, are preſumed to deſign to continue the *Tack* upon the former terms, till the Tenant be warned.

Tacite Relocation.

If

If the *Tack* be granted to *Sub-tenants*, then the *Tacksman* may ſet a *Sub-tack*, which will be as valid as the *principal Tack*, if clothed with *Poſſeſſion*. Tit. VI.

Rentals are alſo a kind of *Tacks*, but more favourable and eaſie, becauſe the *Rentaler* and his Predeceſſors have been *ancient Poſſeſſors*, and *kindly Tenants*; and he pays a *Graſſume* or Acknowledgment at his entry, and yet they laſt no longer than for a Year, if there be no time expreſs'd; and if they be granted to a Man and his Heirs, they laſt only to the firſt Heir; for elſe they behoved *for ever to belong to the Heirs*, and ſo would want an *Iſh*: but no *Tack* is accounted a *Rental* except it be in *Write*, and the *Write* bear the ſame. Rentals.

Rentals cannot be aſſigned, except that Power be granted in the *Rental*; and if the *Rentaler* aſſign, he loſes his *Rental*; though a *Tacksman* forfeits not his Right by *aſſigning* it, the *Aſſignation* being only *null*.

When the Years of the *Tack expire*; or though there be no *Tack*, yet the Maſter cannot *Sumarly remove his Tenant* or *Poſſeſſor*, except from *Life-rented Lands*, and *Houſes*, or *Towers* and *Fortilaces*, and *vitious Poſſeſſors*, whom he can remove Removing ſolemn & ſummar.

Book II. move by a Summons on Six Days; but in all other Cases he must warn him Forty Days before the *Term* of *Whitsunday*, though the *Term* at which he were to remove *by Paction*, were *Mertinmass* or *Candlemass*; which warning must be executed, that is to say, *intimated personally to the Tenant*, and upon the *Ground of the Lands*, and at the *Parish Kirk* immediately after Sermon; in both which places, Copies of the Warning are to be left: and if he then refuses, he must be persued to remove *upon six Days*: and after this Citation, the Master will get against him *violent Profits*; that is to say, the *double of the avail of the Tenement within Burgh*, and the highest Advantages that the *Heritor* could have got, if the *Tenant* possessed Lands in the Country; nor will the *Tenant* be allowed to defend against this removing, till he *find Caution* to pay the *violent Profits* *.

* Q. Mary Par. 6. Act 39.

Tacit Hypotheque.

The *Master* has likewise a *Tacit Hypotheque* in the *Fruits of the Ground*, which he sets to his *Tenant*, in so far as concerns a *Year's Duty*; that is to say, they are *impignorated by the Law* for that Year's Duty, and he will be preferred either to a *Creditor* who has done Diligence, or to a Stranger who has bought them; though

* in

in a Publick Mercat: And the *Lands-Lord* within Burgh, has a *tacit Hypotheque* in all the Goods brought into his Houſe by his *Tenant*, which he may retain, *ay*, and while he be payed of his *Tear's Rent*: which *tacit Hypotheque* the *Superiour* has alſo for his *Feu Duty*. Tit. VII.

TIT. VII.

Of Tranſmiſſion of Rights by Confirmation, and of the Difference betwixt Baſe and Publick Infeftments.

THE *Feu* being thus eſtabliſhed in the *Vaſſal's* Perſon, the ſame may be tranſmitted, either to *univerſal* or *ſingular Succeſſours*: The firſt is properly called *Succeſſion*, which ſhall be handled in the Third Book. *Tranſmiſſion of Rights to ſingular Succeſſours*, is *voluntar* by *Diſpoſition* and *Aſſignation*, or *neceſſar* by *Appriſing* and *Adjudication*, and by *Confiſcation*, when they are *forefaulted for Crimes*, &c. Ways of tranſmitting Feus.

If the *Vaſſal* ſells the Land, the *Superiour* is not obliged to receive the *Sub-vaſſal* except he pleaſes, though the *Charter* bear to him and his *Aſſigns*; and if

Book II. he receive him, there is in Law *a Year's Rent due to the Superiour, as an acknowledgment for changing his Vassal.*

Lands are disponed, either to be *holden of the Disponer's Superiour*, and that is called a *Publick Infeftment*; because it is presumed it will be publickly known, being *holden of the Superiour:* and it is likewise called an *Infeftment à me*; because the *Disponer* gives it to be holden *à me, de Superiore meo:* and this Infeftment is null until it be confirmed * by the *Superiour*, which is done by a *Charter of Confirmation*, wherein the *Superiour narrates the Vassal's Charter*, and subjoins thereto his own *Confirmation* or *Ratification of it*; and the last Right being first confirmed, is still *preferred* †.

Infeftment publick.

* K. Ja. 6. Par. 5. Act 66.

† Act foresaid.

Sometimes also the *Vassal* disponeS Lands to be holden of himself, and this is called *a base Infeftment*, and has been allowed by *Our Law*, (contrary to the Principles of the *Feudal Law*) in favours of *Creditors*, who getting Right for Payment of their *Debts*, were unwilling to be at the *Expences* to get a *Confirmation* from the *Superiour*; and this is called an *Infeftment de me*, because the *Disponer* gives them *tenendas de me, & successoribus meis.*

Base infeftment.

Inf. de me.

These

Tit. VII.

These *base Infeftments* being clothed with *Possession*, are as perfect and *valid* as a *Publick Infeftment*; for Possession is to an *Infeftment* to be holden of the *Disponer*, the same thing that *Confirmation* is to an *Infeftment* to be holden of the *Superiour*: and therefore as in a Competition betwixt two Infeftments of the same Lands, to be holden of the *Superiour*, the first *Confirmation* would be preferred, it being a general Rule in *Law* that amongst Rights of equal Perfection, *Prior in tempore est potior in jure*; so if a *base Infeftment* be clothed with Possession before the *publick Infeftment* be confirmed, the *base Infeftment* will be preferred, though it was granted after the *publick Infeftment*.

Possession Natural and Civil.

For the better understanding of the Nature of *base Infeftments*, it is fit to know, that *Possession* is in *Law*, *Natural* or *Civil*; that is *Natural Possession*, by which a Man is *Naturally* and *Corporally* in *Possession*, as by labouring of the Ground; because sometimes Men could not attain to the *Natural Possession* for compleating their Rights, therefore the *Law* was forced to allow another *Possession* by the *Mind* as that was by the *Body*, and this is called *Civil Possession*;

Book II. because it is allowed and introduced by the *Civil Law*, of which there are many kinds in *Scotland*: As,

Primo, The obtaining *Decreets for Meals and Duties*, and even *Citation* upon an *heritable Right*.

Secundo, Payment of *Annual Rent*, by the *Debitor* to the *Creditor*, who has *Infeftment of Annual Rent*.

Tertio, If a Man be *infeft in Lands*, and for *Warrandice* of these Lands be *infeft* in other Lands, *Possession of the Principal Lands* is reputed, in the *Construction of Law*, *possession of the Warrandice Lands*.

Quarto, If a *Woman* be *infeft* by her Husband in a *Life-rent*, the *Husband's Possession* is accounted the *Wife's Possession*.

Quinto, If a Man *dispone* Lands, reserving his own *Life-rent*, the *Life-renter's Possession* is accounted the *Fiar's Possession*, and a *base Infeftment* is said to be clothed with *Possession*; if he who is infeft hath attained either to *Natural* or *Civil Possession*; for the Law cannot punish a Man for not *apprehending Possession*, who could not *apprehend it*: and for the same reason, if the time of *Entry* was not come, he who is *infeft* by a *base Infeftment*,

feſtment, will be preferred in that caſe, as if he were in Poſſeſſion. And the reaſon of all this is, becauſe Our Law conſidering that *baſe Infeftments* were *clandeſtinely* made betwixt *conſident* and *conjunct Perſons*, to the ruin of *lawful Creditors* who could not know the ſame, there being then no *Regiſter of Seaſins*; it therefore declared all *baſe Infeftments* to be ſimulat, which were not clothed with Poſſeſſion: and *therefore before the Term*, at which he who got the *baſe Infeftment* could enter to the Poſſeſſion, there could be no *Simulation* nor *Fraud* in no Party. And in this the *Law* conſiders much the intereſt *of lawful Creditors*, by ſuſtaining that kind of Poſſeſſion in their *favours*, which would not be ſuſtained in *favours of near Relations*, or where there is no *Onerous Cauſe*: and thus a *baſe Infeftment* given by a *Father* to his own *Son*, will not be clothed with Poſſeſſion by the reſervation of the Father's *Life-rent*, though the *reſervation* of the Father's *Life-rent* would clothe a *baſe Infeftment* granted by him to a *lawful Creditor*; and the *Husband's Poſſeſſion* is accounted the *Wife's Poſſeſſion*, in ſo far as concerns her *principal Jointure*; but not in ſo far as concerns her *additional* Tit. VII.

Book II. *Jointure*, in a *Competition* betwixt her and her *Husband's lawful Creditors*.

There is another Poſſeſſion alſo called *per Conſtitutum*, which is, when a Man who gets a Wadſet, ſets back the Wadſet-Lands to the Diſponer for payment of a *Tack-duty*, called *The back Tack-duty*: and the Wadſetter receiving payment of that *back Tack-duty*, is ſaid to poſſeſs the Wadſet-Lands *per Conſtitutum*.

Sometimes likewiſe for the more ſecurity a *baſe Infeftment*, which is given to be holden of the *Diſponer*, will be confirmed by the *Superiour*; but that *Confirmation* does not make it a *publick Infeftment*; for no *Infeftment* can be called a *publick Infeftment*, but that which is to be holden of the *Superiour*: but the uſe of that *Confirmation* is, that after the *Superiour* has confirmed voluntarly the *Sub-vaſſal's* Right, he thereby acknowledges his Right; and conſequently can ſeek no *Caſuality*, which ariſes upon want of the *Superiour's conſent*, ſuch as *Forfeiture*, or *Recognition*: But becauſe the *Diſponer* is ſtill *Vaſſal*, therefore his *Superiour* will ſtill have right to the *Rents of the Lands*, by his *Liferent Eſcheat*, and to *Wards*, and *Nonentries* by his Death; but if the *Superiour*

Confirmation.

viour enter the *Sub-vaſſal* only upon a Charge, (this being no *voluntar act* of his) that does not cut him off from thoſe *Caſualities*. Tit. VII.

Sometimes likewiſe the *Seller* reſigns the Lands in *favours* of the *Superiour*, if the Lands be ſold to the *Superiour himſelf*, which is called *Reſignatio ad Remanentiam*; becauſe the Lands are reſigned to remain with the *Superiour*: and in that caſe, the *Property* is ſaid to be *Conſolidated* with the *Superiority*; that is to ſay, the *Superiour returns to have all the Right both of Property and Superiority*; nor needs he be *infeft of new*, becauſe (as we *formerly* obſerved) the *Superiour* ſtands ſtill *infeft* as well as the *Vaſſal*; but the *Inſtrument of Reſignation* muſt be regiſtrated in this Caſe, as *Seaſins* are in other Caſes, to put Men *in mala fide* to buy *. Reſignatio ad remanentiam.

* K. C. 2. Par. 2. Seſſ. 1. Act 3.

The other *Reſignation* is called *Reſignatio in favorem*; which is, when the Seller having ſold his *Feu* to a third *Party*, reſigns the *Feu* in the *Superiour's hands*, for new *Infeftment* to be given by the *Superiour* to that third *Party*. Reſignatio in favorem.

The *Warrand* of both theſe *Reſignations* is a *Procuratory* granted by the *Seller* to a *blank Perſon*, (and this *Warrand* is ordinarly Procuratory of Reſignation.

Book II. ordinarly inſerted in the *Diſpoſition*) impowering him to *reſign the Feu in the Superiour's hands*; and this is called a *Procuratory of Reſignation*, and the *Symbols of the Reſignation* are a *Staff* and *Baſton*: and accordingly the *Procurator* compears before the *Superiour*, and upon his *Knee*, holding a *Staff* or *Pen* at the one end, which the *Superiour*, or any having Power from him, holds by the other; whereby he *reſigns the Feu*, either *ad remanentiam*, or *in favorem*, as ſaid is; whereupon an *Inſtrument* is taken by the Perſon in whoſe favours the *Reſignation* is made, which is called the *Inſtrument of Reſignation*; and thereafter the Perſon in whoſe favours the *Reſignation* is made, (if he be not the *Superiour*) is *inſeſt*, and his *Seaſin* muſt be *regiſtrated* within 60 days, as ſaid is.

Inſtr. of Reſig.

The *Reſignation* does not perfectly *denude* the *Seller*, until *Infeftment* be taken upon it; and therefore the *firſt Infeftment* upon a *ſecond Reſignation* will be *preferred* to him, who has but the *ſecond Infeftment* upon the *firſt Reſignation*: but yet the Lands will be in *Nonentry* in the *Superiour's* hand, after the *Reſignation* is made, until the Perſon in whoſe favours it was made be *inſeſt*, for other-

otherways the *Superiour* would want a *Vaſſal*, ſince he could not call him *Vaſſal*, from whom he had accepted of a *Reſignation*; nor is the Perſon in whoſe favours the *Reſignation* is made, his *Vaſſal*, ſince he is not yet *infeft*: but yet the *Buyer* has a *perſonal Action* againſt the *Superiour*, to force him to *denude* himſelf in his favours, ſince he has accepted the *Reſignation*; and he will likewiſe have an *Action of Damnage* and *Intereſt* againſt the *Superiour*, if he accept a *ſecond Reſignation*, whereby a *prior Infeftment* may be taken to his *prejudice*; and until *Infeftment* be taken, the *Superiour* gets all his *Caſualities*, as *Ward*, *Marriage*, *Life-rent*, *Eſcheat*, &c. not by him in whoſe favours *Reſignation* is made; but by him who *reſigns*, ſince he remains ſtill *Vaſſal* till the other be infeft *quoad* the *Superiour's Caſualities*. Tit. VII.

TIT.

TIT. VIII.

Of redeemable Rights.

ANother conſiderable *Diviſion of Heritable Rights* with us, is that ſome are *Redeemable*, and ſome *Irredeemable*.

Redeemable Rights.

Redeemable Rights are theſe which return to the Diſponer, upon payment of the Sum for which theſe Rights are granted; and are ſo called, becauſe they may be *redeemed* by the *Diſponer*; and they are either *Wadſets*, *Infeftments of Annual Rent*, or *Infeftments for Relief*.

Wadſet.

A *Wadſet*, *is a Right whereby Lands are impignorated or pledged for ſecurity of a ſpecial Sum*, which paſſes by *Infeftment* (like other real Rights) in the terms of *Alienation* or *Diſpoſition*; and the *Diſponer* does ſecure himſelf by getting a *Reverſion* from the *Buyer*, wherein he grants and declares *the Lands redeemable from him, upon payment of the Sum then delivered, and of the Annual Rent thereof, which is* Pactum de retrovendendo; and expreſſes the place and time when and where it is to be *delivered*, and in whoſe hands it is to be conſigned; in caſe the receiver of the *Wadſet* refuſe to accept

Reverſion.

accept his Money. Reversions may be either granted by a Paper a-part, or they may be contained in the Body of the Right, and are then said to be *incorporated in gremio juris.* Tit. VIII.

These *Reversions* being against the *Nature of Property*, and depending upon the meer Agreement of Parties, are to be most strictly observed, and are *strictissimi juris*; so that they are not extended to *Heirs* or *Voluntary Assignees*, except they be *express'd.* But yet they may be apprysed, which is allowed for the good of Commerce, though a Compriser be in effect an *Judicial Assignee. Reversions* must be fulfilled in the very terms; and it is not enough that they be fulfilled in *equipollent terms.* But after an order of *Redemption* is used; that is, after the Granter of the *Wadset has duely premonished the Wadsetter*, and consigned the Sums due by the *Wadsetter*, it may be assigned; and though the Reversion bears that Premonition be made at the *Parish Church*, it will be sustained if it be made personally to the *Wadsetter*, for that is a surer *certioration.*

Reversions albeit of their own Nature they are *Personal*, *binding* only the Granter and his *Heirs*, yet they are *real Rights*

Book II. *Rights by our Statutes*, and affect ſingular * *Succeſſours.*

* K. Ja. 3. Par. 5. Act 28. All *Reverſions*, (except they be incorporated as ſaid is) and all Bands to make *Reverſions*, or *Eikes* to *Reverſions*, muſt be regiſtrated within 60 days in the ſame Regiſter with *Seaſins*, for elſe a *ſingular Succeſſour* is not obliged to regard them *; ſo that if any buy the Land

* K. J. 6. Par. 22. Act 16. *irredeemably*, and *compleat* his *Right* before *Regiſtration* of it, though after *Infeftment* upon the *Wadſet* he will be preferred; but they are ſtill valid againſt the *Diſponer* and his *Heirs* without *regiſtration.*

Order of Redemption. When the Granter of the *Wadſet* is to uſe an *Order of Redemption*, he muſt premoniſh the *Wadſetter* to compear, (and take *Inſtruments* thereupon, called an *Inſtrument of Premonition*) to receive Payment of the Sums due to him; and at the time and place appointed by the *Reverſion*, offer being made of the Money; if the *Wadſetter* refuſes voluntarly to renounce, and to accept his Money, it is conſigned in the hands of the Perſon deſigned in the *Reverſion*; or if no Perſon be deſigned, it may be conſigned in any *reſponſal Man's hand:* but there muſt be a *Paper* taken under the *Conſignatar's hand,*

hand, acknowledging that it was consigned in his hand; for though an *Inſtrument* under a *Notar's hand* proves that all this order of *Redemption* was uſed, yet it will not prove the *Receipt* of a Sum againſt the *Conſignatar*.

If the *Wadſetter* receive his Money, and *renounce voluntarly*, this is called a *voluntar Redemption*: But, becauſe though *Renounciations* be ſufficient to extinguiſh a *Wadſet*, (if no Infeftment followed) whether the *Wadſet* was to be holden of the Granter or Superiour, or to extinguiſh it, *quoad* the Granter and his Heirs, though Infeftment followed; yet if the *Wadſet* was given to be holden of the *Diſponer*, the *Wadſetter* muſt reſign *ad remanentiam*, in the *Diſponer*'s hands as his *Superiour*; and thereafter the *Diſponer* needs not to be infeft of new, as no *Superiour* needs: but if the *Wadſet* be given to be holden of the *Superiour*, then the *Diſponer* uſes to take a *Letter of Regreſs*, whereby the *Superiour obliges him to receive back his Vaſſal, when he ſhall redeem his own Lands*; for otherways after the *Wadſetter* is feaſed, the *Superiour* is not obliged to receive him back. But the Lands being redeemed, the *Superiour* may be charged to infeft him,

Voluntar Redemption.

Letters of Regreſs.

Book II. him, which is neceſſary for re-eſtabliſhing the Right in his Perſon.

If the *Wadſetter* refuſes to renounce after the Order is uſed, the Lords will *force him to renounce, and declare the Lands redeemed*, by a Proceſs called *a Declarator of Redemption*; after obtaining of which *Decreet* the Lands are redeemed, and belong to the redeemer, and the *Wadſetter* will upon a *ſimple Charge* of *Horning* force the *Conſignatar* to deliver him up the Money.

Declarator of Redemption.

The Uſer of the *Order of Redemption*, may paſs from it at any time before *Declarator*; and therefore the Sums for which the *Wadſet* was granted, are ſtill Heritable before *Declarator*; but after that they are moveable, and fall to *Executors*, except the *Declarator* be obtained after the *Wadſetter's Death*, in which caſe they remain Heritable: And though the *Wadſetter* require his Money, he may paſs from his Requiſition, either directly by a clear *Declaration* that he paſſes from it, or indirectly by intromitting with the *Duties of the Wadſet-Lands*, or by taking *Annual Rent for terms ſubſequent to the requiſition.*

Wadſets Proper & Improper.

Wadſets are either *Proper*, or *Improper.*

Proper

Tit. VIII.

Proper Wadſets are theſe, *wherein the Wadſetter takes his hazard of the Rents of the Land for the ſatisfaction of his Annual Rent; and pays himſelf all Publick Burdens.*

Improper Wadſets are theſe, *wherein the Granter of the Wadſet pays the Publick Burdens*, and the Receiver is at no hazard, but has his *Annual Rent ſecure.* And if a *Wadſet* be taken, ſo that the *Wadſetter* is to have more than his *Annual Rent*; and yet the *Granter* is to pay the *Publick Burdens*, and free him of all hazards: This is accounted *Uſury* by *Our Law*; the Puniſhment whereof is *Confiſcation of Moveables, loſing of the principal Sum, and annulling the Uſurary, Contract, or Paction* *: And by a late Statute, *If the Debitor even in a proper Wadſet offers Security for the Money, and craves Poſſeſſion, the Wadſetter muſt either quit his Poſſeſſion, or reſtrict himſelf to his Annual Rent* †; or if it be an *Improper Wadſet*, the *Wadſetter* muſt impute the *Superplus*, more than pays his *Annual Rent in ſortem.* And if a Man *impignorat* his Lands, or Bands, with expreſs condition, that *if the Money be not payed at a preciſe day, they ſhall not be thereafter redeemable*: The *Law* reprobates this unjuſt Advantage,

Uſury.

* K. J. 6. Par. 14. Act 222. Par. 15. Act 247.

† K. C. 2. Par. 1. Act 62.

Book II. tage, called *Pactum legis commiſſoriæ, in pignoribus*; and will allow the Money to be offered at the Bar; or they will allow a ſhort time before extracting of the *Decreet* for Payment of it.

Pactum legis commiſſoriæ.

Taking of *Annual Rent* having been diſcharged by the *Canon Law*, Men did buy *Annual Rents* out of other *Mens Lands*, which was *the Origin of our preſent Infeftments of Annual Rent*, and *continues ſtill frequent:* by which if Men reſolve not to reſt on the *Perſonal Security of the Borrower*, they take him alſo obliged to infeſt them in a yearly *Annual Rent*, payable out of his Lands correſpondent to the *Sum lent*; but if they exceed the *ordinar Annual Rent* allowed by *Law*, it will *infer Uſury*; and ſo they have a *double Security*, one *Perſonal againſt the Borrower for Payment*, and another real againſt the Ground, it being *debitum fundi*, for which they may *poynd* any part of the Ground; as alſo they have good Action againſt the *Intromitters*, with the *Duties of the Lands* out of which their *Annual Rents* are payable; though they cannot *poynd* or exact from the *Tenants* any more than they owe to their *Maſter* *; if the *Tenants* compear and inſtruct what they were owing the time they

Infeftment of Rent.

* K. J. 3. Par. 5. Act 36.

they got the *Citation* by producing the Master's Discharges. Tit. VIII.

These *Annual Rents* require a special *Seasin*, like *Wadsets* and other real Rights: the *Symbols* whereof, if the *Annual Rent* be payable in Money, is a *Penny of Money*; but if it be payable in *Victual*, it is a *parcel of Victual*.

This is *singular in Infeftments of Annual Rent*, that appryfings thereupon will be preferred to all *prior appryfings*, *quoad* the by-gones of the *Annual Rent*, if the *Infeftment* of *Annual Rent was prior* to those *appryfings*, to which the *appryfing* will be drawn back, and preferred to *any intervening Right*: which *Privilege* is contained in the *late Act of Parliament*, concerning *Debitor* and *Creditor* *. * K. C. 2. Par. 1. Act 62.

These *Infeftments* of *Annual Rent*, being *properly* granted *for Security of Sums*, are *extinguished* not only by *Resignations*, but by *Renunciations*; and even by *Intromission*, with as much as might pay the *principal Sum*, which *Intromission* is probable by *Witnesses*, whether the Rent be *Victual* or *Money*: and therefore *singular Successors* buying *Infeftments of Annual Rent*, are not secure by any *Register*, but must rest on the *Warrandice of the Seller*.

Book II.

Infeftment of Relief.

Infeftments of Relief are theſe, which *are granted* by a *Debitor* to his *Creditor*, *for ſecurity of Sums owing to him*, upon which the *Creditor* cannot enter to *Poſſeſſion* till he be *diſtreſſed*; and when the *Sum* is payed, the Right becomes abſolutely null, as being but a *temporary Right*, and ſo the *Debitor* who granted the *Right* needs not be *of new infeft*, but his former *Right revives*.

TIT. IX.

Of Servitudes.

THe *Nature and Conſtitution of Property and real Rights, being explained in the foregoing Titles, we ſhall now treat briefly of Servitudes*, which are *Burdens affecting Property* and *Rights*.

Servitudes Real and Perſonal.

Servitudes are either *Real*, or *Perſonal*.

Real Servitudes, are *whereby one Man's Property or Ground is affected with ſome Burden for the uſe and behoof of another Man's Ground directly* and indirectly *for the Proprietar's uſe, as having Right to that Ground*, which are divided in *Rural Servitudes*, and *Urban* or *City Servitudes*.

Rural

Tit. IX.

Rural Servitudes.

Actus, Via.

Rural Servitudes are *Iter*, which is *a Power of going through* our Neighbour's Lands; Actus, *is a* Power *of driving Carts or Wains*; Via, *is the Privilege of having High-ways in our Neighbour's Ground*; and *Aquæ ductus*, which is a *Power and Privilege to draw Water alongſt their Ground for watering of our own*; and thus *Via* includes *Iter* and *Actus* as the leſſer *Servitudes*; ſo he that has *a Via*, has alſo Power to drive Carts and Wains, and to walk himſelf through the Ground burdened with the *Servitude*, and of drawing Stones and Timber through the Ground of the ſervient Tenement.

City Servitudes.

The *City Servitudes*, called *Servitutes Urbanæ*, are chiefly five.

Oneris ferendi.

The firſt is, *Oneris ferendi*, which is *a Privilege, whereby one who has a Houſe in the City, can force the Proprietar who has a Houſe below his, to bear the burden of his Houſe*; and he may force the *Owner of the ſervient Tenement* to repair it, and make it fit for ſupporting the *dominant Tenement*, contrary to the *common nature of Servitudes*.

Tigni immittendi.

Secundo, *Tigni immittendi*, which is the privilege of *forcing our Neighbour* to *receive into his Houſe the Feſts of ours*.

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Stillicidii.

Tertio, Stillicidii vel Fluminis, which is, *whereby our Neighbour is obliged to receive the drops which fall from our House*, under which is likewise comprehended the Privilege *of carrying away our Water by Cinks and Channels.*

Non offic. Luminibus.

Quarto, Non officiendi Luminibus, whereby he can do *nothing that can prejudg our* Lights.

Altius non tollendi.

Quinto, Altius non tollendi, whereby our Neighbour *cannot raise his House higher*, to *prejudg* the *Lights* of the *dominant Tenement*; which he may otherwise freely do if he be not restrained by this Servitude.

By *Our Law*, *Servitudes* may be constituted without any *Seasin*, because they are *incorporeal Rights*; but though a *Servitude* meerly established by *Writ*, be sufficient against the *Granter*, yet they are not *valid* against *singular Successors*; except that Right be clothed with *Possession*, which compleats the *Servitude* and makes it a *real Right*: and they may be likewise established by *Prescription* without any *Writ*, from him who has the *servient Tenement*; though he who is to acquire the *Servitude* by *Prescription*, must have a real Right in his Person of the Lands to which he prescrives the Servitude.

The

The *ordinary Servitudes* ſuperadded by us to theſe of the *Civil Law*, are the *Servitudes* of caſting *Fail* and *Divot*, *common Paſturage* and *Multures*. Tit. IX.

Common Paſturage, is a Right of paſturing the *Goods* and *Cattel of the dominant Tenement, upon the Ground of the ſervient*, which is conſtituted frequently by a *Charter*, containing the *Clauſe of common Paſturage*; and ſometimes by a *perſonal Obligement* clothed with *Poſſeſſion*; but albeit it be *indefinite*, yet it can reach no further than to the *proportion of Goods* effeiring to the Rent of the *dominant Tenement*, and which they may keep and fodder in Winter; which is done by *Sowming* and *Rowming*, that is to ſay, the *determining the proportion of Goods belonging to each dominant Tenement, by aſſigning them particular Rowms according to their reſpective Rents.* Common Paſturage. Sowming & Rowming.

Common Paſturage in our Law does ordinarly comprehend all the *leſſer Servitudes*; ſuch as the caſting of *Fail* and *Divots preſumptively* only; for the one may be poſſeſs'd without the other: nor will *common Paſturage* infer a *Servitude* of caſting off *Fail* and *Divots*, if he who poſſeſſed the *common Paſturage* was interrupted as to the caſting off *Fail and Divot*. Common Paſturage.

Book II.

Thirlage. *Thirlage*, is *that Servitude whereby the Lands of one Heritor are to pay some Duty to the Mill of another.*

Mills. *Mills*, are *inter Regalia*, and require therefore a special *Seasin*; the *Symbols* whereof are *Clap* and *Happer*; but if the *Mill* be in a *Barrony*, *transit cum universitate.*

Multurs. *Mills*, are ordinarly disponed with *Multurs* and *Sequels*; the *Multurs* are a *quantity of Corn, payable to the Heritor of the Mill for Grinding.* The *Knaveship, Lok and Bannock*, are a small quantity payable to the Servants for their pains.

Insucken and Outsucken Multurs. These quantities that are payed by those that are *thirled*, are called *Insucken Multurs*; and those quantities that are payed by such as come voluntarly, are called *Outsucken Multurs.*

Thirlages, are constituted by *Writ*, or by *Prescription.*

The ways of constituting *Thirlage* by *Writ* are these:

First, When a Master *thirles* his own *Tenants* to his own *Mill*; in which case ordinarly he diminishes the Rent of his Land, in *Contemplation* of what they are to pay to the *Mill* for grinding their *Corns*, which he does by an Act of his own Court. *Secundo*,

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Secundo, When a Heritor ſells his Lands to be holden of himſelf, and *thirles* his *Vaſſal* to his *Mill*; in which caſe he ſells ſo much the cheaper, and ſo the *Multurs* are juſt.

Tertio, When the Heritor of a *Mill diſpones his Mill*, with the *Multurs* of his own Lands, in which caſe the *Multurs* are alſo juſt; becauſe he gets ſo much the more for his Mill; and ſo this Servitude is not ſo odious as it is believed to be.

Quarto, If a Man diſpones the Mill of a Barrony, *cum multuris* or *cum aſtrictis multuris*, in either of theſe Caſes he thereby aſtricts his whole *Barrony*; though not formerly aſtricted: but if he diſpone the Mill of the Barrony, *cum multuris ſolitis & conſuetis*; he is thereby underſtood to have *thirled* only what was formerly *thirled*.

If the *Thirlage* bears *omnia grana creſcentia*, all the *Corn* growing upon the Land will be *thirled*, with *deduction* only of *Seed* and *Horſe-corn*, and the *Ferme*, except it be carried to another Mill; for it is preſumed *Fermes* muſt be ſold.

Quinto, When *invecta & illata* are *thirled*, all *Corns* which thole Fire and Water within the *Aſtriction*, muſt pay *Multur*

Book II. *Multur* though they come not to the Mill; and tholing Fire and Water in this Astriction, is so interpreted as to extend only to *Corns that are steeped and kill'd.*

The way of constituting *Thirlage* by *Prescription*, is *immemorial or forty Years Possession*, by virtue of some *Title*; such as a *Decreet*, though in absence; and even when the *Master* is not called: and any Act of a *Barron Court*, though made only by a *Bailly*, without a special Warrand from the *Heritor*, is a sufficient Title for *Prescription:* and though the coming to a *Mill past all Memory*, does not astrict the Comers for the future; it being a general Rule in all *Servitudes*, that, *ea quæ sunt meræ facultatis non præscribuntur*; yet in *Mills* of the *King's Property*, *immemorial Possession* constitutes a *Thirlage:* and if Men likewise pay *dry Multurs*, that is to say, such a quantity, *whether they come to grind or not*, for Forty Years, they will be thereby astricted; for it is not presumable they would have payed *dry Multur* for so long a time except they had been *thirled.*

Dry Multurs.

If the quantity to be payed be not determined in *Writ*, it is regulated by the use of Payment for Forty Years.

Those

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Thoſe who are *thirled*, are alſo obliged to maintain the *Mill*, *Mill-damms*, *Water-gangs*, and to bring home its *Mill-ſtones*.

If ſuch as are *thirled* bring not their *Corns*, they are perſued by an Action called *abſtracted Multurs*.

There are two Rules to be obſerved in all *Servitudes*.

Primo, *Res ſua nemini ſervit*, no Man can have a *Servitude* on what is his own; and therefore if the Land on which we have a *Servitude* become ours, the *Servitude* is *extinguiſhed*.

Secundo, When we have a *Servitude* on any other Land, this *Servitude* affects every foot of that Land, *unaquæque gleba ſervit*; but this is to be taken *civiliter*, *& non judaice*; ſo that it muſt be reaſonably uſed: And thus, if we *feu* out ſome *Acres*, with Privilege to the *Feuer* to caſt *Fail* and *Divot* upon our Moor, for maintaining his Houſes; though in ſtrict Law, every part of the Moor is affected with the *Servitude*; yet the *Lords* will allow any Man to Till and Sow his own Moor, leaving ſuch a *proportion*, as may maintain theſe Houſes.

Perſonal Servitudes.

Perſonal Servitudes, are *whereby one Man's Property is affected with ſome burden*

Book II. *den tending directly to the* Utility and Profit of another Man: And by the *Civil Law* are divided in *usu fruct*, *Use* and *Habitation.*

Usus fructus, is called *Life-rent in Our Law*, which is a *Right to use and dispose upon any thing during life; the substance thereof being preserved.*

Use and *Habitation* were restricted to the *naked use of the Life-renter*; whereby his Power of *disposing* and making *Profit* of the thing *life-rented*, was restrained, and are not in use with us.

Life rents and their Division. *Life-rents* are either constituted by *Paction*, or by *Law*; *Life-rents* by *Paction*, are either by *Reservation*, as when a *Fiar denudes himself* of the *Fie* in *favours* of another, *reserving* his own Life-rent, or by a new Constitution; as when the *Fiar* dispones his Lands to another during all the days of his Life; the first needs no Infeftment, but the second does; else it is not *valid* against *singular Successors*: but the *Life-renter* being *infeft*, *transmits* his *Right* to any by *Assignation* without *Infeftment*: for it being a *Servitude* and *Personal Right*, it neither needs nor can admit of a *Subaltern Infeftment.*

A *Life-renter* also by Reservation, may enter the Heirs of Vassals (though he cannot receive *singular Successours*) if he was himself infeft; but another *Life-renter* cannot; and even a *Life-renter* by *reservation* cannot enter those *Vassals*, if he was not once infeft, because he cannot transmit a Right which he has not.

When moe Persons are jointly infeft, they are called *conjunct Fiars*; but though a Wife be a *conjunct Fiar*, yet her *Fie* lasts but during her *life*; and during her *life* she may enter *Vassals*, and has Right also to all the *Casualities*, as other *Fiars*. Conjunct Fiars.

Life-rents by Law, are the *Terce* and the *Courtesy*. Life-rents by Law.

The *Terce* is a *Life-rent* of the *Third of all the Tenements, wherein the Husband died infeft, provided by Law to a Wife*; which is explained before, *Tit. Marriage*: which *Terce* is constituted by an Inquest, who upon a Brief out of the *Chancellary*, directed to the *Sheriff*, or other *Judg ordinary*, do serve her to a *Terce*: upon which Service, the Judg to whom the *Brief* was directed without *retouring* it, divides the *Land* betwixt the *Heir and Relict*, and expresses the *Marches* in an *Instrument*; and this is called to *kenne her*

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her to her Terce; the *Marches* being *kenned* by the *Inſtrument*: and though the *Service* gives her Right to the third of the *Meals* and *Duties*, yet ſhe cannot remove *Tenants* thereby, till ſhe be *kenned to her Terce*, or the ſame otherwiſe divided; becauſe before diviſion, ſhe bruiketh the *Terce pro indiviſo*, with the Proprietar.

Brieves.

This *Brieve* contains two Points; Firſt, that the *Bearer* was *Lawful Wife* to the defunct; And *Secundo*, that he died *infeft* in ſuch *Tenements*: but if the *Relict* was holden and reputed *lawful Wife* in her *Husband's life*, no exception in the contrary will ſtop the Service *.

* K. Ja. 4. Par. 6. Act 77.

There is no *Terce* in *Burgage Lands*, *Feu Duties*, or other *Caſualities* of the Superiority, nor in *Reverſions*, *Tacks* nor *Patronages*.

Courteſie.

The *Courteſie* is a *Life-rent* granted by *Law to him who married an Heretrix, of all her Heritage, and of that only*: needs neither *Seaſin*, nor other *ſolemnity* to its *Conſtitution*; but is *ipſo jure*, continued to him; if there were Children *procreated* of the *Marriage*, who were heard *to cry*, though the *Marriage diſſolve* within *Year* and *Day*.

All

All these *Life-renters* are obliged to find *Caution* to preserve the thing *life-rented*, and to leave it in as *good condition* as they found it, which is called *cautio usufructuaria*; and they are also bound to *aliment* the *appearand Heir* if he have not *Aliundi*, to *Aliment* himself *.

Cautio usufructuaria.

* K. Ja. 4. Par. 3. Act 25.

The Legal terms of all *Life-rents*, are *Whitesunday* and *Martinmas*: And therefore if a *Life-renter* survive *Whitesunday*, or die upon the *Whitesunday* in the Afternoon, her *Executors* have Right to the half of the *Life-rent* Duties for that Year, whether they be payable in *Victual* or *Monies*: And if she survive *Martinmas*, or die upon *Martinmas-Day* in the Afternoon, her *Executors* have Right to the *Life-rent* Duties of that whole Year, and that whether it be *Land-rent*, or the *Rent of a Mill*, albeit the *Conventional terms* were after *Martinmas*: But if *Life-renters* labour the Lands themselves, their *Executors* will have Right to the whole Rent thereof, at whatever time their death happen.

TIT.

TIT. X.

Of Teynds.

Teynds. *TEynds*, being a *Burden affecting Lands*, fall in to be conſidered in this place.

Teynds are defined to be that *ſpecial and liquid Proportion or Quota of our Goods and Rents lawfully acquired, that is due to GOD, for maintaining his Service.*

It ſeems *Our Law* has followed the opinion of thoſe *Divines*, who think that ſome *Proportion* of our Goods is due by *Divine Right*; for we ſay, that *Teynds are the Spirituality of the Churches Revenue*; but that the Proportion is not *Juris Divini*, for we alter the Proportion by ſpecial *Laws* and *Cuſtoms*; though for diſtinction's ſake we call this *Proportion* the *Tenth*.

By the *Canon Law* they are divided into * *perſonal Teynds*, which *ariſe out of the perſonal Gain and Profits that a Man has by his Trade or perſonal Induſtry*: † *Predial Teynds*, which *ariſe from the Natural Product of the Land that Men poſſeſs. And mix'd Teynds which ariſe*

* Perſonal Teynds.

† Predial Teynds.

ariſe from the Profits that Men by their perſonal Induſtry make out of their Lands.

Parſonage and Vicarage Teynds.

They are likewiſe divided into *Parſonage Teynds*, which are *due to the Parſon*; and *Vicarage Teynds*, which *are due to the Vicars:* and regularly all *Teynds are due to the Incumbent*, who ſerves the *Cure*; ſo that if the *Incumbent* be a *Parſon*, he has a Right to the *Parſonage Teynds*; and if he be a *Vicar*, he has Right to the *Vicarage Teynds.*

The *Teynds* of *Corn* are called *Parſonage Teynds*, or *decimæ garbales*; and the *fifth Boll* of the *Free-rent* is ſtill *Teynd* with us: And all Lands muſt pay *Teynd*, except they be ſuch as have been *feued* out of old by *Churchmen* before the *Lateran Council*, (by which they were prohibited to *alienate* the *Teynds*) and who had right both to *Stock* and *Teynd*; and where the *Teynds* were never *known to have been ſeparated from the Stock.*

Some *Monks* likewiſe got particular *Exemptions* from paying *Teynds* for theſe Lands which they themſelves did bring in and *cultivate*; and with us the Privilege granted to *Temple-Lands*, which belonged of old to the *Knights of St.* John, *a Religious Order*, and to the *Monks* of the *Ciſtertian Order*, are continued to

Book II. thoſe who have Right to their Lands, with that *Exemption*: *Manſes*, and *Gleibs*, are likewiſe free from payment of *Teynds*.

Vicarage Teynds, are called the *ſmall Teynds* with us; becauſe they are payable out of inconſiderable things, ſuch as *Lambs*, *Wool*, *Cheeſe*, *Eggs*, &c. and they are ſaid to be *local*, becauſe they are payed according to the Cuſtom of the Place; ſo that in the ſame *Pariſhes*, ſome *Heritors* will be liable for *Vicarage Teynds* of different kinds: for though no Man can preſcrive a *liberty* from payment of *Parſonage Teynds* ſince the *Lateran Council*; yet, as *forty Years Poſſeſſion* is a ſufficient Right to a *Miniſter* for *Vicarage Teynds*; and as it does determine the *Quota*, as well as the *Species of Vicarage Teynds*; ſo by *forty Years freedom*, the *Heritor* is ſecure in all time coming from payment of *Vicarage Teynds*.

When *Popery* was ſuppreſs'd, all the Lands belonging to *Monks* and others, were *annexed* to the *Crown*, in *An.* 1587*: but the *Teynds* belonging to them, were not annexed; theſe being acknowledged by our Law to be the *Patrimony of the Church*; and they are therefore called, the *Spirituality of the Benefices*.

* K. Ja. 6. Par. 11. Act 29.

The

The *Monaſteries* of old having gotten ſeveral *Pariſh Churches* mortified to them, whereby they had Right to their *Parſonage Teynds*; ſuch as got thoſe *Monaſtries erected* in their favours, became thereby to have Right to other *Mens Teynds*: And great Emulation as well as Prejudice ariſing from Mens not having Right to lead their own *Teynds*; Tit. X.

King *Charles* the Firſt, did therefore prevail with all the ſaids *Titulars of Erection*, to ſubmit what ſhould be payed them, as the price of the ſaids *Teynds*; and His Majeſty did determine, *That the rate of all Teynds ſhould be the fifth part of the conſtant Rent*, where the *Stock* and *Teynd* were accuſtomed to be ſet jointly; but where the *Teynds* were ſet ſeparately from the *Stock*, the *Heritor* did in the Valuation get down a fifth part of what was proven and valued to be the rate of the *Teynds*; and which Deduction is called the *King's Eaſe*; becauſe it was given by him in his Decreet Arbitral. It was alſo ordained, That the ſaids *Teynds* being valued, ſhould be bought at Nine Years purchaſe *.

* K. C. 1: Par. 1. Act 17, and 19. K. C. 2: Par. 1. Seſſ. 1: Act 61:

For effectuating this *Determination*, the *Parliament* 1633, appointed ſome of their own number, to value the ſaids

Book II. Valuation of Teynds.

Teynds; and after a *Proceſs for Valuation* is raiſed before theſe Commiſſioners, in which the Titular his *Tacksman*, and the *Miniſter* are to be cited, the *Heritor* in the mean time gets the leading of his own *Teynds*.

The *Probation* is oft-times allow'd to both *Parties* in this *Court*; and where one *Party* is preferred, it is called, the *Prerogative of Probation*; and is much contended for, and is thus regulated, *viz.* either the *Teynds* are drawn *ipſa corpora*, by the *Titular*, or *Tacksman*; and then they have the *ſole Probation* allowed them, to prove what the *Teynds* were worth, (they proving that they led *ſeven Years* of *fifteen* before 1628.) or elſe they have *Rental Bolls* payed them; *& eo caſu*, they have the *ſole Probation* likeways, they proving *twenty Years Poſſeſſion* of uplifting *Rental Bolls*, condeſcending upon *quantity* and *quality*: Or *Tertio*, the *Heritors* have Tacks of their own *Teynds* for payment *of Silver Duty*; and then there is *joint Probation* allowed both to *Heritor* and *Titular*.

Eccleſiaſtick Perſons, ſuch as *Biſhops*, *Parſons*, &c. ſubmitted only what they were not in *Poſſeſſion of*; and therefore there can be no *Valuation* led of any *Teynds*,

Teynds, *Parſonage* or *Vicarage*, which they were *actually in Poſſeſſion* of: but by a *Letter* from His Majeſty thereafter, in *Anno* 1634, it is declared, That *if their Teynds be ſet to Tacksman, they may be valued during the Tack; whereas the Teynds they were in the natural Poſſeſſion of cannot; though Teynds holden of Collegiat Kirks may be valued, and ſo may be bought and ſold.* Tit. X.

The *Burroughs* are only *decerned* to ſell the *Superplus* of the *Teynds* they had Right to, over and above what will be due for the entertainment of their *Miniſters*, *Colleges*, *Schools* and *Hoſpitals*.

After the *Teynds* are valued, and the *Titular decerned* to ſell; or if the *Titular* be willing to ſell without a *Decreet*, the *Heritor* is *infeft*, and *ſeaſed* by the *Titular*, who in the *Diſpoſition* or *Charter* reſerves to himſelf relief of the *King's Annuity*, and of all *Impoſitions* laid or to be laid upon *Teynds*; and *Warrands* only from his own, and his *Predeceſſor's Facts* and *Deeds*; and on the other hand, the *Heritor* who has got *a Decreet of Valuation* only, and not *of Vendition*, is obliged to *infeft* the *Titular*, for *Security* of the *valued Bolls*.

Book II.

Burdens affecting Teynds.

By the foresaid *Decreet Arbitral*, the several *Parish Kirks* were to be provided; and therefore the *Titular* might *Allocat* any one *Heritor's Teynds* for Provision of the *Minister*, which renders the Privilege of buying very ineffectual to the *Heritors*; whereas it had been much better that the *Stipend* had been proportionably laid upon all the *Heritors*.

Teynds are not *debita fundi*, and so *singular Successors* are not liable in them; but yet the *Minister* has so far a *tacit Hypotheque*, that he may exact his *modified Stipend* from any of the *Heritors*, as far as his *Teynds* will extend, reserving *relief* to that distressed *Heritor*; and if the *Heritor* sell his *Crop*, the *Merchant* who *buys* the same will be liable; but Tenants will not be liable, if they pay a *joint duty* to their *Master* both for *Stock* and *Teynd*.

When the *Tack of Teynds* expire, the *Titular* needs not use a *warning* against the *Tacksman*, as in *Lands*; but he raises and executes an *Inhibition* against the *Tacksman*, which interrupts *tacit Relocation* for that and all the *subsequent Years*, after which the *Intromettors* are liable to a *Spuilye*.

Inhibition upon Teynds.

The

The *Parliament* 1633, did after the ſaid *Submiſſions* and *Decreet Arbitral*, grant to His *Majeſty* an *Annuity* out of all *Teynds*, except thoſe payed to *Biſhops* and other *Pious Uſes*; viz. *ten ſhilling out of every boll of teynd Wheat*; out of the *boll* of the beſt *teynd Bear*, *eight ſhilling*; out of *Oats*, *Peaſe*, and *Rye*, *ſix ſhilling*, where the *boll of* theſe *Grains* did yield a *boll of Meal*; and where the Rent conſiſts *of Money*, *ſix merks out of* every *hundred*: and this *Annuity* is *debitum fundi*; but not being *annex'd to the Crown*, it may be, and is ordinarly bought by the *Heritors* from His *Majeſty's Theaſaurer*, or others having *Right from the King*. Tit. XI. Annuities of Teynds.

TIT. XI.

Of Inhibitions.

PRoperty and Real Rights, with the Burdens affecting the ſame, being explained; it is fit now to treat of *Legal Diligences*, by which theſe *Rights may be evicted*, or the *free uſe* and *diſpoſal thereof reſtrained*; which *Diligences* are chiefly three, *Inhibition*, *Compryſing*, and *Adjudication*.

Book II.

Inhibition. *Inhibition*, is a *perſonal Prohibition by Letters under the Signet, diſcharging the Party inhibited to ſell, dilapidate, or put away any of his Lands, in prejudice of the Debt due to the Raiſer* of the *Inhibition.*

Ground thereof. The Ground and Warrand thereof is a *Decreet*, or a Regiſtrate Bond, (which in the Conſtruction of Law is a Decreet) either *decerning* or *obliging* the *Debitor to pay or perform* the Sums or Deeds therein ſpecified; or a *depending Proceſs:* And if theſe *Inhibitions* be not raiſed upon *Legal* and *Relevant* Grounds, they may be reduced.

Extent thereof. *Inhibitions* reach only *Heritage*, but not *Moveables*; though the ſtile thereof runs equally againſt both; and *moveable Bands* can only be reduced; in ſo far as they may be the Foundation of *real Diligences* to affect *Heritage*, reſerving ſtill perſonal Execution againſt the Granter; and they extend only to *poſterior voluntary Rights granted after Inhibition*, but not to *Appryſings*, or *Adjudications*, though led poſterior to the *Inhibition*, if the ground thereof was *Anterior:* neither do they extend to *poſterior Diſpoſitions* and *Infeftments* depending upon *prior Obligements*, either general or particular, for granting of theſe Rights; nor

to

to *Renunciations of Temporal Rights*, albeit *posterior* to the *Inhibition*, these being neceſſar upon Payment.

By a late Act of *Sederunt* *, *If the Creditor intimate by way of Inſtrument, to the Perſon having the Right of Reverſion, that the Wadſetter or Annual-renter ſtands inhibit at his inſtance, and does produce in preſence of the Parties and Notar, the Inhibition duly regiſtrated*; The Lords *will not ſuſtain Renunciations, or Grants of Redemption, although upon true Payment, unleſs there be a Declarator of Redemption obtained, to which the Inhibiter muſt be cited.*

* Act of Sed. 19. Feb. 1680.

The way of *executing Inhibitions* is, that the ſame muſt be by a *Meſſenger* againſt the Perſon *inhibited*, *perſonally* or at his *Dwelling-place*, and at the *Mercat-Croſs of the Head Burgh of the Shire, Stewartry*, or *Regalities* where the *Perſon inhibited* dwells *: and after *Crying of three ſeveral O yes's*, and publick reading of the Letters, the *whole Leiges are diſcharged* to purchaſe any Lands or Heritages, from the *Perſon inhibited*; and the *Meſſenger* leaves or affixes a *Copy of the Letters at the Mercat-Croſs*, all which muſt be written in a Paper, and ſubſcribed *by the Meſſenger* and by two *Witneſſes*;

Manner of executing Inhibitions.

* K. J. 6. Par. 15. Act. 264, and 265. Par. 16. Act 13.

Book II. neſſes *; which Writ is called *the Execution of Inhibition:* and thereafter the *Letters and Execution thereof muſt be regiſtrated* within forty days after the *Execution* thereof; either in the *general Regiſter* at *Edinburgh*, or in the *particular Regiſter of the Juriſdiction*, where the *Perſon inhibited* dwells, or the *major part of the Lands lye* *: and if any of theſe *Acts* be *omitted*, the *Inhibition* is *null*; theſe being *de ſolennitatibus inſtrumenti.*

* K. C. 2. Par. 3. Act 26.

* K. J. 6. Par. 7. Act 119.

TIT. XII.

Of Compryſings and Adjudications.

THe *Fie being thus ſettled in the Vaſſal*, it may be either taken from him, and evicted for *his Debt* or his *Crimes*; the firſt is by *Appryſing* and *Adjudication*, and the laſt by *Confiſcation* and *Forefaulture.*

Appryſing. *Appryſing* proceeds by *Letters* charging the *Debitor* to compear before a *Meſſenger*, (who is by the *Letters* made *Judg*, and *Sheriff* in that part, in Place of the *Sheriff of the Shire*, whoſe Office properly it is *) and to hear the *Lands ſpecified* in the *Letters*, *appriſed* by an *Inqueſt*

* K. Ja. 6. Par. 5. Act 37.

queſt of *fifteen ſworn Men*, and declared to belong to the *Creditor for Payment of his Debt*. But becauſe *Our Law* thought it not juſt that a Man's Lands ſhould be taken from him whilſt his *Moveables* could pay his Debt; therefore, in the firſt place the *Meſſenger* who executes the Letters, muſt declare that he *ſearched for Moveables*; and becauſe he could not find as many as *would pay the Debt*, therefore he denounced the Lands to be appriſed on the *Ground of the Lands*, and at the *Mercat-Croſs* of the *Shire*, *Stewartry*, or *Regality* where the *Lands lye*, and left *Copies both on the Ground*, and at the *Croſs*. Tit. XII.

At the day appointed by the *Letters*, the *Meſſenger* who is made *Sheriff* in that part, *Fences a Court*, and the *Debitor* being called, his Lands are offered to him for the *Money*; and if the *Money* be not ready, the *Inqueſt* finds that the *Debitor's Lands* ſhould belong to the *Creditor for his Payment*, and this is called *a Decreet of Compryſing*; and the moſt part of the *Inqueſt affixes* their *Seals thereto*; upon which the *Compryſer* gets a *Charter* paſs'd in *Exchequer*, and is *infeft by Precepts out of the Chancellary*, if the Lands hold of the *King*: and though Decreet of Compryſing.

Book II. of old, *Land appryſed* was proportioned to the *Money*; yet thereafter whatever *Land* was ſought to be *appryſed* was accordingly *appryſed*, though *far exceeding* the *Sum* in *value*; becauſe *ſeven Years* was given (which was thereafter *prorogated* to *ten* *) for *Redeeming the Land by Payment of the true Sum:* and this is called a † *Legal Reverſion*, becauſe the *Law* gives it to the *Debitor*; and if it be not *redeemed* within that time, the *Land* belongs to *himſelf for ever:* but that *legal* runs not againſt *Minors*, becauſe they want *Judgment* to know their *hazard*; ſo that they may *redeem* at any time before they be *twenty five Years compleat:* but if the *Compryſing expire* during their *Minority*, the *Compryſer* will thereafter have *Right* to the whole *Meals* and *Duties*, albeit exceeding his *Annual Rent:* But that part of the *Act* is altered by a *poſterior Statute*, and the *Appryſer* is *reſtricted* to his *Annual Rent* during the *Minority of the Debitor* *.

If a *Minor* ſucceed to a *Minor* whoſe *Lands* are *appryſed*, he has Right to redeem, as if the *Compryſing* had been led againſt himſelf: But if a *Major* ſucceed to a *Minor* after the *Legal* is expired, he hath only *Year* and *Day* to *redeem*; and

* K. C. 2. Par. 1. Seſſ. 1. Act 62.

† Legal Reverſion.

* K. C. 2. Par. 1. Seſſ. 3. Act 10.

if

if the ſeven Years be unexpired in the *Minor's* time, the *Major* may redeem within theſe Years that are not run: And if the Rent of the Lands be not correſpondent to the *Annual Rent of the Money*; whoever has Right to the *Reverſion*, whether *Major* or *Minor*, muſt ſatisfie the whole *Sums* and *Annual Rents* reſting before he can * redeem: But the *Compryſer* during the *Legal*, is reſtricted to the *Annual Rent* of the Sums due to him, and the *ſuperplus of his Intromiſſion*, will be imputed in Payment of his *principal Sum*; and if he be payed by *Intromiſſion*, within the *Legal* of his whole *principal Sum*, by-gone *Annual Rents* and *Expences*, with the *Compoſition* payed to the *Superiour*, the *Compriſing* expires *ipſo facto* *. Tit. XII. * K. J. 6. Par. 23. Act 6. * K. Ja. 6. Par. 21. Act 6.

Though the *Superiour* be not regularly obliged to receive a *ſingular Succeſſour*, yet leſt by *Colluſion* betwixt the *Debitor* and his *Superiour*, the true *Creditor* ſhould be unpayed; therefore by a ſpecial *Act of Parliament*, the *Superiour* is forced to receive a *Compryſer* upon Payment of a full Year's Duty of the Land *, and he gets no more from all, though many *Compryſers* charge him to receive them; but if the *Superiour* pleaſes, he may retain the * K. Ja. 5. Par. 5. Act 37. K. J. 6. Par. 23. Act 6.

Book II. the Land to himself, he paying the Debt.

The first *Comprising* without *Seasin*, carries Right to all *Tacks*, *Reversions*, and other Rights which require no *Infeftment*; and all *posteriour Comprisings* need not *Infeftment*, because they carry only the Right of *Reversion*; but yet ordinarly *second Apprisers* do *infeft* themselves, because the first may be *null*, or become payed; or the first *Comprifer* may lye out from seeking *Meals* and *Duties*; or the second *Comprisers* would remove Tenants, which none can pursue without being *infeft*; but the *Superiour Comprising* needs no *Infeftment*.

After *Denunciation* of the Lands to be *apprised*, the *Debitor* can do no voluntar Deed by disponing or resigning, (because else he might frustrate the *diligence*) except he was before *Denunciation* specially obliged to *Dispone* or *Resign*.

Preference amongst Apprisers. In a Competition amongst *Apprisers*, the first *Infeftment* or Charge against the *Superiour* is always preferred; and if the first *Comprifer* did diligence to be infeft, but was stopt by *Colluſion*, as if the *Superiour* to gratify the second *Comprifer*, should unjustly suspend the first, albeit the

the second *Appriser* be first *infeft*, yet the first *Appriser* having done *diligence*, by charging the *Superiour*, will be preferred to the second *Appriser* first *infeft*. Tit. XII.

The *Compriser* during the *Years of the Legal*, is not obliged to enter to the *Possession*; but if he once enter, he must be comptable for the *Meals* and *Duties*, though he leave off to *possess*; but if the meanest part of the Sum be unpayed after the expiring of the *Legal*, the whole *Land compriſed* belongs to the *Compriser*, without consideration of what he has *intrometted* with; to prevent which, the *Debitor*, or a *Second*, or any *posterior Compriser*, who has *compriſed* the Right of *Reversion*, does before the *Legal* expire, require the *Compriser* to compear at any *Day* or *Place* to receive his *Money*, in so far as he is not payed by his *Intromission*; and having *consigned* the same accordingly at that Day, he raises an *Action of Compt* and *Reckoning* before the *Lords of Session*; and if it be found that he is payed by *Intromission*, and the Money *consigned*, *the Lords decern the Compriſing to be payed and extinct*: nor needs the *Debitor* get *new Seasin*, for the former Right revives; since the *Fie* was still in his Person, upon condition that he would *pay the Sum* within the *Legal*.

In

Book II.

Sherriff Fie.

In this *Compt* and *Reckoning*, the *Compriſer* will get allowance of the *Sheriff* Fie; which is the *twenty Penny* of the *Sum* that was *compriſed* for, and of the *entry* payable to the *Superiour*, though the *Appriſer* truly payed neither; but he will not get Payment of a *Factor's Fie* for taking up the *Rent*, except he really payed it.

K. C. 2. Par. 1. Act 62.

All *Appriſings* led ſince the Firſt of *January* 1652, within *Year* and *Day* of the firſt *effectual Compriſing* by *Infeftment*, or charge againſt the *Superiour*, come in *pari paſſu*, as if they were all contained in one *Appriſing*. But the *poſterior Appriſings* within Year and Day, muſt pay their Proportion of the Expences of the *Infeftment*, and *Compoſition* given to the *Superiour* by the firſt *Appriſer*.

Act foreſaid.

Becauſe *appearand Heirs* did frequently acquire Rights to expired *Appriſings* againſt their *Predeceſſors*, by which they *bruiked their Eſtates* without paying their Debt, to the ruin of *lawful Creditors*: Therefore *Our Law* did very juſtly ordain all ſuch *Appriſings* to be *redeemed* for the *Sums truly payed* out by the *appearand Heir*; which proceeds, albeit the *Appearand Heir* acquire theſe Rights in his *Prede-*

Predeceſſor's life-time. But if the expired *Appriſing* was acquired *gratis* by the *appear and Heir*, the ſame is only redeemable by the *Creditors* for the Sums contained in the *Appriſing.* Tit. XII.

Becauſe the *Parliament* thought it *exorbitant* to take the greateſt *Eſtates* for the ſmalleſt Sums, and to make a *Meſſenger Judg* in Affairs of ſo great *Importance*; therefore in *Anno* 1672. this way of *Compriſing* was altered, and in place thereof the *Creditor* now gets Land adjudged to him by the *Lords of the Seſſion*, proportionally to the *Sums* due to him (with a fifth part more) beſides the Compoſition due to the Superiour, and Expences for obtaining *Infeftment*, becauſe the *Creditor* is obliged to take Land *for his Money*; which *Adjudication* coming in place of *Compriſings*, is perfected by *Charter* and *Seaſin*, as *Compriſings*; and the *Superiour* is obliged to receive the *Adjudger* *, but it is redeemable only within *five Years* by *Majors.* Adjudication.

* K. C. 2. Par. 2. Seſſ. 1. Act 18.

If the *Debitor* compear not to concur for compleating the *Adjudger's Right*, by giving him a *Progreſs*, and *tranſumpts of the Evidents*, and ratifying the *Decreet of Adjudication*; then the whole Lands muſt be *adjudged*, as they were formerly *appri-*

Book II. *ſed*, (nor in that caſe can the Adjudication contain a fifth part more) it being unreaſonable to *force* a Man to take *proportional Land* for his *Money*, and yet to be unſecured even for that *Proportion*; and they are *redeemable* within *ten Years*, (theſe *Adjudications* being now come in the place of *Appryſings*) and have the ſame *Privileges* and *Reſtrictions* which *Compriſings* had by the *Act of Parliament*, made concerning *Debitor* and *Creditor*, in *Anno* 1661. But if the *Creditor* attain Poſſeſſion upon his *Compriſing*, or *Adjudication*, he can uſe no farther *execution* againſt the *Debitor*, except the Lands be *evicted* *.

* K. C. 2. Par. 2. Seſſ. 3. Act 19.

There are other two kinds of *Adjudication* †, allowed by *Our Law*; The firſt is, when the *appearand Heir of the Debitor is charged to enter Heir*; and renounces to be *Heir*; the *Creditor* having obtained a Decreet, *cognitionis cauſa*, for conſtituting the Debt, wherein the *appearand Heir* is only purſued for *Formality*: But the Decreet can have no *effect perſonally* againſt him; in which caſe, the *Hereditas jacens* will be *adjudged* to the *Creditor* for Payment of the Debt due by the *Defunct*; which if it be *liquid*, and inſtantly inſtructed, the *Purſuer* in the ſame Proceſs prote-

† Adjudications after the old Form.

proteſting for *Adjudication*, the ſame will be allowed to him, ſummarly without neceſſity of any other Decreet, *cognitionis cauſa*. Tit. XII.

Theſe *Adjudications* are redeemable within *ſeven Years*, at the inſtance of *Con-creditors* one after another, who have likewiſe obtained Decreets of *Adjudication*: And a *Minor* renouncing to be *Heir*, may be *reponed*, and allowed to *redeem upon Payment* *. But *Majors* renouncing have not that Privilege directly, it being only by Act of Parliament granted to *Minors* or to *Con-creditors*, likewiſe Adjudgers. Legal Rever. of Adju. * K. C. 2. Par. 1. Seſſ. 1. Act 62.

And if the *Superiour* be charged to inſeſt the *Adjudger*, he will get a Year's Rent for *Compoſition*, as in *Compriſings* *. * K. C. 2. Par. 2. Seſſ. 1. Act 18.

Adjudications carry right to all which would have fallen to the *Heir*, as all heritable Rights; and the whole by-gone Rents and Duties, ſince the Defunct's death, may be *adjudged*, becauſe theſe belonged to the *Heir*.

There is another kind of *Adjudication* competent by Our Law; that is for performing any obligement which conſiſts *in facto*, and relates to particular *Diſpoſitions*, and *Obligements* to *infeft*: and after

Book II.

diligence uſed by *Decreet*, and *regiſtrated Horning* againſt the Diſponer and his Heir, and for making the ſame effectual, the Lords will *adjudg the Lands diſponed to belong to the Purſuer as a Remedium extraordinarium*, there being no other Remedy competent.

This *Adjudication* extends no further than to the thing diſponed, and hath no *Reverſion.*

If the common *Debitor* become *Bankrupt*, and that there are real Diligences affecting his Eſtate, then the Creditors may raiſe an *Action of Sale before the Lords*, and get the Eſtate rouped *, and divided amongſt them, effeiring to their Diligences and Sums.

* K. C. 2. Par. 3. Act 17.

In this Proceſs, the Lords firſt determine what ſhall be the loweſt Price, and then they name one of their Number before whom the *Roup* is to be made; and if none offer more, the Raiſer of the Action is preferred, and the *Lands* are diſponed by that *Lord*, and the diſpoſition runs in his Name.

Confiſcation.

Confiſcation will be handled in the *Title of Crimes.*

THE

THE INSTITUTIONS Of the LAW of SCOTLAND.

BOOK III.

TITLE I.

Of Obligations and Contracts in general.

HAving thus cleared *Real Rights*, we will now proceed to treat of *Obligations*, and *Personal Rights*.

Obligations. An *Obligation is defined to be that legal Tye whereby we are bound to pay or perform any thing.*

Division of Obligations. The chief *division* of *Obligations* by the *Civil Law* and *Ours*, *is*, that some are *Natural*,

Book III. *Natural*, because they arise from the Principles of *right Reason*, or *Laws of Nature*. Some *Civil*, because they arise from *Positive Laws*, or *Municipal Customs*.

Another Division of Oblig.

Another considerable *division* of *Obligations* is, that some arise from *Contracts*, some from *Deeds* resembling *Contracts*, some from *Malefices*, and some from *Deeds* which resemble *Malefices*; *Ex contractu, aut quasi contractu*; *ex maleficio, aut quasi maleficio*: for we become equally tied and obliged to *Men*, either by *contracting expresly* with them, or by doing some Deed which induces an *Obligation* without an *express Paction*; or by committing *Malefices* against them.

Contracts.

A *Contract is an Agreement entered into by several Persons, inducing an Obligation by its own Nature*; *and the Obligations arising from Contracts* are divided and distinguished according as they are perfected, either by the *sole consent* of the *Contracters*, or by the *Intervention* or *Tradition* of things; or lastly, by *Word* or *Writ*: hence is that remarkable *division of Contracts* in the *Civil Law*, *Qui re, verbis, literis, aut consensu perficiuntur*.

Real Contracts.

The *Contracts* which depend upon things are these, which arise either from *Borrowing*,

Borrowing, (which comprehends *indebitum solutum*) or from *Loan*, or from *Depoſitation*, or from *Impignoration*; and are called *mutuum*, *commodatum*, *depoſitum* & *pignus*. Tit. I.

Borrowing, or Mutuum, *is that Contract, whereby a Man getting any thing from another, is obliged to reſtore him not the ſame thing that was borrowed, but the equivalent; or as much of the ſame quality in meaſure, number, and weight:* as when one borrows a *Thouſand Pounds*, the *Receiver* obliges himſelf to reſtore not the ſame, but another *Thouſand Pounds*; and therefore the *Property of the thing borrowed*, being transferred from the *Giver* to the *Receiver*, the *Receiver* runs the hazard of all the loſs that the thing borrowed can ſuſtain after it is delivered: This Contract is moſt ſtrictly interpreted, ſo that nothing is underſtood but what is clearly expreſs'd. Mutuum.

Loan, or *Commodatum*, is that *Contract* whereby a Man *gets the Loan of any particular thing* gratis, *for ſome ſpecial uſe, and obliges him to reſtore the ſame thing* in ſpecie, *and not the equivalent*; as when a Man gets the *Loan* of a *Horſe*, or *Coach*: and becauſe in this caſe the *Property* remains with the *Lender*, therefore Commodatum.

Book III. fore if the thing lent be loſt, or periſh by Chance, the loſs redounds to the *Lender*; for the thing is ſtill his: but if the thing be lent meerly for the advantage of the *Borrower*, he is liable to do moſt exact diligence; and therefore, if the thing periſh, or ſuſtain any prejudice for want of exact diligence, the *Borrower* muſt make up the ſame; but if the thing was lent for both the *Borrower* and the *Lender's Advantage*, then from the ſame principle *of natural Equity*, the *Borrower* is only obliged to do ſuch diligence, and to be ſo careful of the thing *borrowed* as he would have been of his own.

In this *Contract*, the *Receiver* is obliged to reſtore the ſame *Species* in as good condition as he got it; and the *Lender* is obliged to pay the *Receiver* any conſiderable Expences, that he neceſſarly beſtowed upon the thing *borrowed*, the *Law* not allowing *inconſiderable Expences*; becauſe the *Borrower* has the uſe of the thing which ſhould compence theſe.

Precarium. *Precarium* is, *when any thing is lent to be called back at the Lender's pleaſures, wherein it differs from* commodatum; which *imports* always a *determinate time* for making uſe of the thing lent.

Depoſi-

Depoſitation is that *Contract* which is entered into by one Man's *delivering any thing into the Cuſtody of another to be kept* gratis *for his uſe*; and therefore becauſe in this *Contract* the *Property remains* with him, who did *depoſitate the thing*, if it be loſt, it is loſt to him: and ſince *Depoſitations* are made for the *behoof of him* who does *depoſitate*, therefore the *Depoſitar* (for ſo we call him, in whoſe hand the thing is *depoſitated*) is only liable if the *thing depoſitate* was loſt by the *Depoſitar's* dole, or *groſs fault*; *nam depoſitarius tantum præſtat dolum, & latam culpam*: But *Inn-keepers*, *Stablers*, and *Maſters of Ships*, are liable to moſt exact diligence; in *preſerving the goods of Travellers* and *Paſſengers*, which they bring into their Houſes and Ships, and to repair and make up all the loſs they may ſuſtain while they are in the *Inns* or *Ships*, whether the prejudice come by the *Servants* or *Mariners*, or by *Strangers*; which ſpecial kind of *Depoſitation*, is *introduced by Equity*, *contrary* to the *Common Rules* of *Depoſitation*, and which we have immediately from the *Civil Law*, and *edictum prætoris*, intituled, *Nautæ caupones ſtabularii*, &c.

Tit. I. Depoſitation.

Nautæ caupones Stab. &c.

As

Book III. As in this *Contract*, the *Depoſitar* is liable to reſtore the ſame thing that is *depoſitate*, and not the *equivalent*; ſo he who *depoſitates* is obliged to pay the *Depoſitar* what he beſtowed upon it, whilſt it did lye beſide him; for generally a *Gratuitous Office*, ought to prejudge no Man. But he cannot crave *Compenſation* upon any Debt due to him by the Perſon who *depoſitates*, which is *ſingular in this Contract*, for he muſt firſt anſwer his truſt.

Pledg. *Pledg*, is the *Contract* whereby *one Man gives to another any thing, for the Receiver's Security of what he owes him, to be re-delivered* upon *Payment*; and therefore, becauſe the thing it ſelf *in ſpecie*, is to be re-delivered, if it periſh during the *Impignoration*, without the groſs fault or fraud of him who receives the *Pledg*, it periſhes to the *Impignorator*; and becauſe *Impignorations* are made for the advantage of the Giver and Receiver, (the one being concerned to get Money, or ſome ſuch thing upon the Pledg, and the other to get a Pledg for ſecurity of his Money) therefore he who receives the Pledg, is liable to do ſuch Diligence for preſerving thereof, as prudent Men uſe to do in their own Affairs; but he is not liable for *culpa leviſſima*, the Contract being

being for the behoof of both Parties; and he will have *Repetition* from him, for what he profitably beſtowed upon it during the *Impignoration*. Tit. I.

Sometimes what is *impignorated* is not delivered, and then the Pledg is called an *Hypotheque*, and the Law ſometimes makes ſuch *tacit Hypotheques* without *expreſs Paction*, as where it makes the Corn growing upon Land, or the Goods brought into the Houſe, to be liable to the *Heritor* for Payment of his Rent. Hypotheque.

If one Man pays to another more than is due to him, or what is not due at all, the Law allows to him *Repetition* of what was unjuſtly payed; and this is called *condictio indebiti*, becauſe by *paying* to you, I oblige you *really* and *in effect* to repay what ſhall be found not to be *due*, or to have been *payed* more than was *really due*: but ſince this Obligation ariſes from the Payer's ignorance, therefore if he knew that what he payed was *due*, he will not get *Repetition*; but what he payed will be look'd upon as a *Donation*, but it muſt be *ignorantia facti*, for *ignorantia juris* availeth no Man: And ſince this repayment is only allowed by the *Principles of Natural Equity*; therefore if what was payed was due in *Equity*, though it was Condictio indebiti.

not

Book III. not due by *positive Law*, the Payer will not get *Repetition*.

TIT. II.

Of Obligations by Word or Writ.

Obligation by Writ. SOme *Obligations* require *Writ* to make them *binding*, whereas others require *Writ* only by way of *Probation*; that is to say, *cannot be proven without Writ, though they be valid, and binding without it.*

All *Obligations* for *transmitting the real Right of Lands*, or others to be perfected by Writ, do so far require *Writ* of their own Nature, that though the Bargain be solemnly and clearly ended by *Verbal Transaction*, yet there is still place to *resile*, or *locus pœnitentiæ*, till the *Writ be signed.*

Promises. Though *Verbal Promises* do by *Our Law* bind the *Promiser*, yet because the *Position* and *Import* of words may be easily mistaken by the *Hearers*; therefore *Verbal Obligations* or *Promises* can only be proven by *Oath of Party*, and not by *Witnesses*, though the Sum be never so *small.*

Because

Tit. II.

Becauſe *Mens Subſcriptions* may be eaſily *counterfeited*; therefore by an *expreſs Statute* with *Us*, no Writ of Importance (which we interpret to be when it is granted for more than 100 *lib.*) is valid; except it be ſigned *in preſence of two ſubſcriving Witneſſes*, if the Party can write; or by two *Notaries* and four *Witneſſes* if the Party cannot write *; except the Writ be *Holograph*; that is to ſay, all written with the Granter's own Hand, and that the *Writer* and *Witneſſes* be *ſpecially deſigned* *: and though the *ſubſcriving* by two *initial Letters* be ſuſtained, where it is proved that the *Subſcriver* was in uſe ſo to *ſubſcrive*; yet the *Granter's* mark is not ſufficient, except the Verity of the affixing that Mark be referred to the *Granter's Oath*. And if the Sum, though exceeding 100 *lib.* be reſtricted to an 100 *lib.* the Obligation will be ſuſtained, though it want Witneſſes.

* K. J. 6. Par. 13. Act 175.

* K. C. 2. Par. 3. Act 5.

Such is the *favour of Commerce*, and ſuch *Expedition* it requires, that upon its *account*, *Bills of Exchange* are ſuſtained; though they be not ſigned before *Witneſſes*; and *delivery of Goods* upon *Bargains* are ſuſtained to be prov'd by *Witneſſes*, though there be no Writ, there being

Bills of Exchange.

Book III. being no Writ uſed in ſuch caſes. And ſuch is the *favour of Contracts of Marriage*, eſpecially where they are become *Notor* by *ſubſequent Marriage*; that they are ſuſtained though there be no *Witneſſes*.

Delivery of Writs.

By *Our Law* an *Obligation* in Writ is not binding, except it either be *delivered*, or diſpence with the not delivery, by a ſpecial *Clauſe* therein, *nam traditione tranſferuntur rerum dominia*: but *Tradition* is not requiſite in *mutual Contracts*, or where the Granter has an intereſt to keep the Paper himſelf, as where his Life-rent or Liberty to alter is reſerved; and if the Writ be in his hand in whoſe Favours it was made, it is preſumed to have been delivered, and cannot be taken from him upon the pretence of *not delivery*; except it be referred to his Oath, that it was never a delivered Evident by the *Granter*.

TIT.

TIT. III.

Of Obligations and Contracts ariſing from Conſent, and Acceſſory Obligations.

THough all *Contracts* require the conſent of the *Contracters*, yet there are four, *viz. Emption*, *Location*, *Society*, and *Mandat*, which are ſaid in a more ſpecial way to ariſe from Conſent; becauſe theſe Contracts are perfected by meer *Conſent of Parties*, without any farther Solemnity, or Tradition: and thus how ſoon two Parties agree concerning the price of any thing that is to be ſold, that *Contract* is by meer Conſent ſo far perfected, that he hath the Seller preciſely obliged to deliver the thing bought, and perfect the Sale; albeit the *Dominium* or Property be not transferred, but remains with the Seller until delivery: and if the thing bought periſh without the Seller's fault even before delivery, the loſs is the Buyer's, in reſpect of the perſonal Obligement upon the Seller to deliver it, and the *Buyer's Right is eſtabliſhed* even before *Tradition*; and though *Earneſt* or *Arles* be given as

Contracts perfected by Conſent.

Em. & vend.

Earneſt.

Book III. as a *Symbol* or *Mark* of *Agreement*, yet the consent without the *Earneſt* or *Arles* (as we call it) compleats the *Bargain*; and if the *Earneſt* be in *current Money*, it is to be imputed as a *Part of the Price*.

In this *Contract of Emption* and *Vendition*, there muſt be a Price conſiſting in *Numerat* and down *told Money*; for if one thing be given for another, the Law calls that *Contract*, *Permutation*, or *Excambion*, and not *Emption* and *Vendition*: and this Price muſt be certain and definite; and if the Price be referred to another, the Bargain will ſubſiſt, except that third Party to whom it was referred, either will not or cannot determine the Price.

Location and Conduction.

Location and *Conduction* is a *Contract whereby a Hire is given, for the Uſe and Profit of any thing, or for the Work of Perſons.* It differeth from *Emption* and *Vendition* chiefly in this, that the deſign of the *Contract* is to *transfer* the Property; but in *Location* the Property remains with the *Setter*.

This *Contract* being entred into by the *mutual Conſent*, and for the Advantage of both Parties, the Conductor is only liable to uſe and adhibit a moderate Diligence

gence, for preſerving the thing ſet; that is, ſuch *Diligence as prudent Men adhibit in their own Affairs*; ſo that if the ſame periſh without his *groſs and ſupine Negligence* or *Fraud*, he is not liable to make it up to the *Locator*. Tit. III.

Location or ſetting of *Lands* for a certain hire, (called the *Tack-Duty*) is frequent in *Scotland*; and it is to be obſerved, that if the *Ground yield no increaſe*, but is abſolutely *Barren*, without the Fault of the *Conductor*, the Hire will not be due, ſince that was given for the *Profit* and *Uſe* of the Ground: But if there be not an *abſolute Sterility*, and that the *Land* yield ſome Profit though never ſo little, the Hire will be due, if the Profit but exceed the expence of the *labouring*. Tack-Duty.

From this *Contract* there ariſe *two Actions*; the one whereby the *Conductor* is obliged to pay the Hire agreed unto, and to reſtore the thing ſet after the end of the *Location*, in as good condition as he got it. The other is an Action whereby the *Locator* is bound to refund to the *Conductor* the neceſſary Expences imployed upon the thing hired, during the *Location*. *Vide ſupra*; *Book II. Title VI.*

Book III. Society.

Society is a *Contract* whereby ſeveral Perſons oblige themſelves to *communicate Loſs and Gain ariſing from the things common in the Society.*

All the *Partners* in the *Society*, do by the *Nature of this Contract* ſhare *equally*, except it be otherwiſe *provided*; and if either the ſhare of the *Gain* or *Loſs* be expreſſed, the one *regulates* ſtill the other: but becauſe ſome *Mens Pains* are of as great *Value* as other *Mens Money*; therefore it is lawful and conſiſtent with the *nature of Society* to contract ſo, as that one may have the *half of the Gain*, and no *Loſs*: but the *Contract* would be *null*, if it were provided *that one ſhould have all the Gain and no Loſs*; for there could be no *Compenſation*, though the other were never ſo skilful.

By this *Contract*, all the *Partners* are obliged to advance for the *Affairs of the Society*, according to the ſhares they have in it.

Ways of diſſolution of Society.

The *Society* is *extinguiſhed*, and the *Perſons* who entered therein *looſed* therefrom, by the death of any of the *Partners*, or by their becoming *inſolvent*, except it be otherwiſe provided; for this is a *Perſonal Contract*, wherein Men reſpect the Humour and Induſtry of one another, and ſo

So this Contract is dissolved by the *simple* Tit. III.
Renunciation of any of the Partners; so
that every one has a *Negative Vote*, and
if the Society be entered into with this
condition, *that it should not be dissolved at the Option of any of the Partners, the Law does reprobate such Pactions:* and
from the *same Principle* likewise it is, that
Partners in a *Society*, are not liable *for farther diligence* than they used to *adhibit* in their own *Affairs*, having *voluntarly chooſed* one another for *Partners*;
for it is presumed they are *satisfied* with
one another's *Diligence*, the *Contract* being entered into for the *behoof and profit*
of all the *Partners*.

Mandate, is that *Contract* whereby Mandate.
one imploys another to do, or *manage any Business gratuitously*; for if he who is
imployed get a *Reward*, it is not properly
a Mandate, but *Locatio operarum*, or *a feeing of the Person* so employed; but
yet if the *receiver* of the *Mandate* has
been at any *expence* upon the *account*
of the *Mandate*, the *Employer* must
pay it.

He who receives the *Mandate* is obliged to *execute the same*, according to the
Rules prescrived by the *Employer*, and
not to exceed the Bounds of his *Mandate*:

Book III. And therefore if *Titius* employed *Seius* to buy him such a particular piece of Land for 10000 *lib.* *Titius* is obliged to *ratify his Bargain*, though he buy it for 9000 *lib.* because *Ten* comprehends *Nine*; but if he pay 12000 *lib.* for it, he is not obliged to ratify the Bargain, because he exceeds the Bounds of his Commission.

Mandates expire either by the *Revocation* of the Employer, if the thing or business in which he was employed be entire; or by the death either of the Person employed, or of the Employer; or by the *Renunciation* of the Person employed: but in all those cases, if the *thing undertaken* be not intire, the Person employed, or his *Heir*, may and must proceed to *execute the Mandate*, notwithstanding of the *Revocation*, *Death*, or *Renunciation*.

Diligence of Mandatars.

Mandatars are liable for *exact diligence*, & *culpa levissima*; because albeit the *Mandate* be only *gratia Mandantis*, yet the *very Nature* of it implies *Diligence*.

Div. of Mandates.

Mandates are either *express*, *arising* from *express consent*; or *tacit*, which are inferred by *Signs* and *Taciturnity*: as for instance, if a *Person present* suffers another to *act in his Affairs*, he is understood to give him thereby a *tacit Mandate*.

Secundo,

Tit. III. Gen. and ſpecial Mand.

Secundo, *Mandates* are either *General*, *for managing all Affairs*; or *Special*, for doing ſome *particular Buſineſs*, conform to the *preciſe tenor* of the *Commiſſion*: and albeit *general Mandates* contain moſt ample Power of *Adminiſtration*; yet they are not extended to *committing of Crimes*: Or,

Secundo, to *Donations*; albeit where there is any probable cauſe *Gratifications* may be allowed, which will be regulated *ſecundum arbitrium boni viri*; this being *contractus bonæ fidei*, which implies *exuberant Truſt*.

Tertio, No *general Mandate* will imply a Power to *alienate Immoveables*; or to ſubmit or tranſact any *litigious buſineſs*.

Quarto, If in the general *Mandate* ſome ſpecial Caſes are expreſs'd, it will not be extended to Caſes of greater importance than thoſe expreſs'd.

The great *favour of Commerce*, has introduced another kind of *tacit Mandate*; by which *Exercitors of Ships*, and *Prepoſitors* are obliged by the Contracts of the *Maſters of the Ships*, and of the *Inſtitors*, in relation to the Ships and Voyages; or to the particular *Negotiations* wherein they are intruſted.

Book III.

Exercitor. *Exercitor*, is he to whom the Profit of a Ship doth belong, whether he be the *Owner*, or hath only *freighted the Ship*; the *Master* is the Person intrusted with the *charge of the Ship*, who has Power to oblige the *Exercitor*, by *contracting for the Reparation and Out-rigging of the Ship*, and in Matters relating to the *Voyage*.

Institor. *Institors* are intrusted with *particular Negotiations at Land*, such as keeping of Shops, *&c.* and they oblige their *Prepositors*, in relation to the Affair wherein they are intrusted, as *Exercitors* are in *Maritime Affairs*.

Neither the *Master* of Ships nor *Institors*, need shew their *Commission*, but their being in the *Office* is sufficient to oblige the *Exercitors* and *Constituents*. And if there be *many Exercitors*, the *Master's Contract* obliges them all *in solidum*, albeit what was borrowed be not employed for the use of the *Ship*; only it must be known to the *Lender*, that the *Ship* stood in need of such *Reparations*: and the *facts* of the *Institors* will oblige their *Constituents* of whatsoever *Sex* or *Age* they be; and even though they be *Pupils*, *Minors*, or *Wives*, who cannot *validly oblige themselves*; for they have themselves to blame who intrusted such Persons, As

As all those *Obligations* and *Contracts* arise from *express consent*, so others arise from *tacit consent*, such as *Homologation*; As for instance, though a Man be not obliged by a Bond granted in *Minority*; yet if he pay a part of it, or *Annual Rent* for it, after he is *Major*; the *Obligation* is thereby *homologated*, or *own'd*, and becomes *valid*, not from the time of the *Homologation*, but from the date of the *Writ*: and therefore it is fit that such as design not to *own null or invalid Deeds*, should abstain from doing any thing that may *infer* an *Approbation* of them; but because *Homologation* is *actus animi*, therefore it should not be proved by *Witnesses*.

Homologation.

Because all *Obligations* cannot be bound up under *general* and *regular Names of Contracts*; therefore the *Law* allows some *Obligations* to pass under the Name of *Quasi Contractus*, because they have the *resemblance*, and are of the Nature of *Contracts*; and these are *Negotiorum Gestio*, whereby if any Person manage your *Business advantagiously* for you, you are liable to him for his *expence* though you gave him no *Mandate*, lest such as are absent should be *prejudged* by the *Negligence* of their *Friends*,

Quasi contractus.

Negotiorum Gestio.

Book III. and their averſneſs to meddle with other Peoples Affairs where they are to have nothing allowed them for their expences. As the *Manager* is liable to refund to the *Perſon whoſe Affairs* he *managed* any *Prejudice* done to him ſince, elſe any Man might be *invited officiouſly* to meddle in another Man's Affairs to his *diſadvantage*; but this is to be underſtood, *ſi inutiliter geſſeret*: otherwiſe if he *acted profitably*, albeit the Event do not ſucceed, he will get his *Expences*.

Tutory. The other *quaſi contractus*, are *Tutory*, *communion of Goods*, *entring Heir*, *the Obligation of Re-payment that ariſes upon Payment of what is not due*: For if one be Tutor to you, he enters in a kind of Contract with you, whereby he is bound to adminiſtrate your Affairs, and you are bound to pay him his Expence. But of all theſe I have treated elſewhere in their proper Places, as I ſhall do of *Malefices*, and what reſembles them, when I come to treat of Crimes, of which theſe may be properly ſaid to be *Branches*.

Cautionary. Having thus treated of *Principal Obligations*, the only *Acceſſory Obligation* that I need mention is *Cautionary*, whereby one Man becomes *Surety for another*, either to pay a *Sum*, or perform a *Deed*; betwixt

betwixt which two there is this difference, that theſe that are *Cautioners for a Sum*, if they be bound conjunctly and ſeverally with the *principal Debitors*, may be purſued without purſuing the *Principal*: and *quoad* the *Creditor* they are *Principals*: but theſe who are *Cautioners* for performing of *Deeds*; as *Cautioners for Executors and for Curators* or *Factors*, or for *Meſſengers*, cannot be purſued till the *Principal* be diſcuſſed; for they being only obliged that their *Principals* ſhall *Compt* or be *Honeſt*, therefore they cannot be liable until the *Principals* firſt be cited to compt in the one Caſe, or to anſwer for their *Delinquencies* in the other; and they are only liable to make up what is wanting from their *Principals* after they are diſcuſs'd. Tit. III.

Becauſe *Cautioners* for Sums bound *conjunctly* and *ſeverally*, are liable as *Principals*; therefore their *Obligation* may ſubſiſt, though the *Obligation of the principal Party* be found *null*, or reduced by any Privilege given to the *Principal* by Law: as if a Man become *Caution* for a *Minor*, or for a Woman who is married, *Nam ſibi imputet*, who became a *Cautioner* for ſuch; but if the *Obligation* was abſolutely null in it ſelf, as if the *Principal*

Book III. *pal* did not ſign, then this *Obligation* becauſe it is but *Acceſſory*, retains ſo much of its own *Nature* as to free the *Cautioner*.

Relief of Cautioners.

Cautioners are to get Relief from their Principals, not only of the principal Sums and Annual Rents, but of all Damage and Intereſt, and whether the ſame be provided by the Bond, or not; and where there are many *Co-cautioners*, they are liable *in ſolidum, quoad* the *Creditor*: But if any of them pay the whole Sum to the *Creditor*, though he get aſſignation from him to the whole, yet he muſt only ſeek his Relief from the other *Cautioners*, with *deduction of his own Part*, which proceeds albeit there be no Clauſe of *mutual Relief* in the Bond; and they muſt communicate to their *Co-cautioners* what Eaſe they get by way of *Tranſaction* from the *Creditor*; but if they get the ſaid Eaſe by a meer *Gratification*, as by *Donation*, &c. then they are not bound to communicate what Eaſe they get; for a *Creditor* may juſtly gratify one of his *Cautioners* as his Friend or Relation, without being obliged to gratify the reſt.

* Subject-Matter of Obligations.

To make *Obligations* effectual, it is neceſſary that the * Subject-Matter thereof be

be such as will admit of an *Obligation:* Tit. III.
For no Man can oblige himself to do what is either *impossible*, *unlawful*, or *dishoneſt*, nor to transmit the *Property* of things *Sacred*, (these not being in *Comercio*;) and albeit when the *Performance of Obligations* becomes impreſtable, the *Party* is liable for the Value, as *Damage* and *Intereſt*; yet in these the Value is not *due*, nor will he be liable in a *Penalty*, in case of not-*performance*.

But yet a Man may oblige himself to do something not in his own Power, as to cause another *dispone Lands*; and if he fail, he will be liable *pro damno & intereſſe*, or for the *Penalty*.

Amongſt *Obligations*, *Donation* is also reckoned, which is an *Obligation proceeding from* a *lucrative Cause* or *Title*: For he who *voluntarly* and *gratuitously* promises to give any thing, is thereby obliged to deliver the same; and this *voluntar giving* is called *a Donation*, which is in *Law* defined to be *a meer Liberality proceeding from no previous Compulsion*. Donation.

It may be *perfected* either by *Writ*, or without it; but if without *Writ*, it must be proven by Oath.

Donations are either *Simple*, *Remuneratory*, or *Mortis causa*, that is to Div. of Donat.

ſay, *Donations made in Contemplation of Death.*

Remuneratory Donations.

A *Remuneratory Donation*, called Ἀντιδοτον, is when a Man *beſtows any thing not gratuitouſly*, but *to requite and repay ſome good Deed done, or to be done to him*, and ſo is not purely a *Donation*.

Donation in Contemplation of Death.

A *Donation in Contemplation of Death*, is *when the Giver deſigns rather the Perſon to whom he gifts to have what is gifted than any other; but wiſhes himſelf to have it, rather than him to whom he gifts it.* And therefore though *pure Donations* are not *revokable*, yet a *Donation Mortis cauſa*, is being of the Nature of a *Legacy*; and no *Donation* is preſumed to be *Donatio Mortis cauſa*, except it appear to be ſo either expreſly, or by ſtrong Preſumptions, that the thing *gifted*, was only *gifted in Contemplation of Death.*

Gifts, being a meer *Liberality*, are not preſumed; and therefore by *Our Law*, *Debitor non præſumitur donare quamdiu eſt debitor:* But this being only a *Præſumptio Juris*, may be taken off by ſtronger Arguments, juſtly inferring, that *Donation* rather than Payment was deſigned.

TIT.

TIT. IV.

Of the Diſſolution or Extinction of Obligations.

HAving cleared how *Obligations* are conſtituted, it remains now to conſider how they are *taken off* and *extinguiſhed*; which is either by a *Contrary Conſent*, or by *Implement* and *Satisfaction*.

Since *Conſent* is neceſſary to the *Conſtitution of Obligations*; ſo a *contrary Conſent*, whether by a *Diſcharge*, or *pactum de non petendo*, does diſſolve and extinguiſh Obligations; *nam nihil eſt tam naturale, quam eo genere quidque diſſolvi quo colligatum eſt*: And therefore if the *Obligation* be conſtituted by *Writ*, it requireth *Writ* to the Diſſolution thereof, which is called a *Diſcharge*; and *Diſcharges* require the ſame Solemnities that *Obligations* do; but yet, if the *Obligation* was ſatisfied, *via facti*, as by *Intromiſſion* with Rents of Lands, *&c.* it is probable by Witneſſes, as all Facts are. Diſcharge.

Diſcharges

Book III.

Diſcharges general and particular.

Diſcharges are either *general of all that Parties can ask or claim, or particular of one particular thing or ſubject:* And in *general Diſcharges*, if any particular thing be expreſly diſcharged therein, the *general Clauſe* will be extended to Particulars of no greater importance than thoſe expreſly diſcharged.

Apochatrium annorum.

Diſcharges do ordinarly bear a Clauſe *diſcharging all Precedings till their Date*; and albeit they do not, yet three *conſecutive Diſcharges*, do preſume that all bygones are ſatisfied if they be immediately ſubſequent to one another, and granted by *Parties*, having Power to *diſcharge*, as *Diſcharges* by *Heritors* or *Chamberlains* to their *Tenants*; and therefore *Diſcharges* of *three ſubſequent Years* granted by *Merchants* who bought the Ferm of theſe Years, will not infer the preſumption; but it will be inferred by *Diſcharges* for a part of the three Years granted by the Father, and the reſt by his eldeſt Son, as Heir; the *Diſcharges* being in *Writ*, containing a *diſcharge of the whole Year's Rent*; ſo that *partial Receipts*, albeit they extend to more than the Year's Rent, will not preſume *that all Precedings are payed*; neither one *Diſcharge* for three *ſubſequent Terms* or *Years*,

Years, the *Presumption* being inferred from renewing *of the Discharges each Year* without Reservation. Tit. IV.

Obligations are *extinguished* and *dissolved* by Payment, which is, *performing of the Obligation* in *the precise terms thereof*, and is so *favourable*, that if it be made *bona fide*, *it dissolveth the Obligation*, albeit he to whom it was made had no Right: so Payment made to a *Procurator* after the *Procuratory was revoked* without the *Payer's* knowledge, will be sustained; and Payment made to *Ministers serving the Cure*, though they have no *Title* to the *Benefice*, will *liberate the Payers*. Payment.

Obligations are likewise fulfilled by *Acceptilations*, which is an *imaginary satisfaction*, whereby the *Creditor acknowledges to have got Payment* when he hath not, and has the *Effects* and all the *Privileges of Payment*. Acceptilation.

Secundo, by *Compensation*, whereby if the *Creditor* of a *liquid Sum* become *Debitor* to his *Debitor* in another *liquid Sum*, the two *Obligations extinguish* each other *ipso jure*, and is *equivalent to Payment in all* Cases; but if the *Sums* be not *liquid*, or if a *Species* or *Body* be craved to compense a *liquid Sum*, it will not be allowed. Compensation.

Tertio,

Book III. *Tertio*, *Obligations* are taken away by *Innovation*, which is, the *changing one Obligation for another*; and if the Perſon of the *Debitor* be changed, it is called *Delegation*.

Innovation.

Innovation is never preſumed except it be *expreſly mentioned*, or that the *Obligation* bears expreſly to be in *ſatisfaction of the former*.

Quarto, *Obligations* are extinguiſhed by *Confuſion*; that is to ſay, when the *Debt* and *Credit* meet in the ſame *Perſon*; as when the *Debitor* ſucceeds to the *Creditor*, or the *Creditor* to the *Debitor*, or a *Stranger* to both: and the reaſon of the *Extinction* in theſe caſes is, becauſe the ſame *Perſon* cannot be both *Debitor* and *Creditor*.

Confuſion.

TIT. V.

Of Aſſignations.

NOT only Moveable, but Heritable Rights whereupon no Infeftment has followed, and all Incorporeal Rights requiring no Infeftment, ſuch as *Reverſions*, *Patronages*, *Servitudes*, &c. are tranſmiſſible by Aſſignation: But if Seaſin be

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be once taken on an Heritable Right, it cannot thereafter be tranſmitted by *Aſſignation*, but by *Diſpoſition, which is a Writ diſponing Lands or other Moveable Rights, containing a Precept of Seaſin and Procuratory of Reſignation*: And though a Life-rent at firſt is to be compleated by a Seaſin, as differing from other Heritable Rights only in its Endurance, yet being once compleated, it may thereafter be tranſmitted by *Aſſignation*; for it continues not then to be a formal Life-rent-Right in the Perſon of the *Aſſignee*, but reſolves only in a temporary Right during the Cedent's Life-time. Tit. V. Diſpoſition.

He who grants the *Aſſignations* is called the *Cedent*, and he who receives it, is called the *Aſſignee*. Cedent and Aſſignee.

An *Aſſignation* is alſo compleated by Intimation; and therefore in competition betwixt divers *Aſſignees*, the firſt *Intimation* is always preferred: This *Intimation* is made by a *Procurator*, who takes *Inſtruments* in the hands of a *Notar*, that ſuch an *Aſſignation* was *intimated*, (ſo that one Man cannot be both *Notar* and *Procurator*;) and if after this the *Debitor* pay the *Cedent*, he muſt repay it to the *Aſſignee*, becauſe the *Cedent* was denuded by the *Aſſignation*; and the Intima- Intimation.

Book III. tion puts the *Debitor* in *mala fide* to pay the *Cedent*: and for that same reason, the *Cedent's Oath* will not prove against the *Assignee*, if the *Assignation* be for an *onerous Cause*.

But if the *Assignation* be *gratuitous*, or for the *Cedent's* behoof; or if the matter be *litigious*, the *Assignation* being after a *depending Process*, in any of these Cases the *Cedent's Oath* will prove against the *Assignee*.

A *Pursuit* or *Charge of Horning* upon the *Action assigned*, has likewise the *force* and *effect* of an *Intimation*.

The *Debitor's* private knowledg of the *Assignation*, is not equivalent to an *Intimation*; but his paying a part of the *Sum* or *Annual Rent* for it, is equivalent to an *Intimation*; and much more the *writing a Letter* promising to pay, since that is in effect a *renewing the Obligation*.

Bills of Exchange, and *Orders by Merchants* to pay, need not be *intimated*; because in *Commerce* we are governed by the *Law of Nations*: nor need *Assignations* to *Reversions* be *intimated*, because the *Registration* is a *Publication* of them, (the Registration of *Seasins* and *Reversions* being designed for *Publication*.) But the using Inhibition against the *Cedent* upon

upon the *Assignation* is not equivalent to an *Intimation*, the chief design of Inhibitions being for Execution and not for *Publication*. *Legal* and *Judicial Assignations*, such as *Apprisings*, *Adjudications* and *Marriage*, need no *Intimation*; and that becauſe they are paſt, and expede publickly. Tit. V.

A *Blank Band* is equivalent to an *Aſſignation*, and ſo muſt be intimated; and in *competition* with other Rights, it is only preferred according to the date of the *Intimation*, that the Receiver's name was filled up in it. Blank Band.

It is a *general Principle* in *Our Law*, *that in the competition of moe Creditors, the firſt compleat Diligence is ſtill preferred*: And therefore an *Aſſignation* is preferred to an *Arreſtment*, if it be *intimated* before the *Arreſtment*; but if the *Intimation* and *Arreſtment* be in one day, they come in *pari paſſu*; except the *Arreſter* be in *mora*, and do no *diligence* upon his *Arreſtment*. Or, that both Diligences expreſs the hour of the Day, and the one be prior to the other.

TIT. VI.

Of Arreſtments and Poyndings.

THe *ordinary Diligences* in *Our Law* affecting *Moveable Rights*, are *Arreſtment*, which anſwers to *Inhibition* in *Heritage*; and *Poynding*, which anſwers to *Compriſing in Heritage*.

Arreſtment. *Arreſtment* is the *Command of a Judg, diſcharging any Perſon in whoſe hands the Debitor's Moveables are, to pay or deliver up the ſame, till the Creditor who has procured the Arreſtment to be laid on be ſatisfied.*

Arreſtments may be laid on by any *Judg* in whoſe *Territories* the Goods are, or by the *Lords of the Seſſion* where-ever they lye, and that by *ſpecial Letters of Arreſtment*; or by a Warrand expreſs'd in the *ordinary Letters of Horning*: theſe *Letters* are executed by a *Meſſenger*; and if after it is laid on, the *Party* in whoſe hands it is made, *pay*, he may be forced to pay the ſame over again, or may be purſued *Criminally* for breaking *Arreſtment*, the Puniſhment being *Confiſcation* of *Moveables*, and their Perſons to be in the *King's Will* *.

* K. J. 6. Par. 7. Act 118.

Arreſt-

Arreſtment can only affect *Moveables*; but all Sums of Money due by Bonds, whereupon no Infeftment has followed, are *Arreſtable* *: And as *Moveables* can only be *arreſted*, ſo the ground thereof muſt only be for Payment of Moveable Debts, or *ex paritate rationis* for Payment of ſuch Debts, which are not ſecured by Infeftment; and it reaches only to the Sums already due, or for which the *Year* or *Term* is *current*. Tit. VI.

* K. C. 2. Par. 1. Seſſ. 1. Act 51.

How ſoon an *Action* is raiſed againſt a *Perſon*, his *Goods* may thereupon be *arreſted*, and this is called an *Arreſtment* upon a *Dependence* *; but this *Arreſtment* may be looſed by *Letters* for looſing of *Arreſtment*, which paſſes upon a *Common Bill*: and a *Band of Cautionry* is given to the *Clerk of the Bills* *, wherein the *Granter* of the *Band* obliges himſelf to pay the *Sum*, if the *Arreſtment* be found *lawful*, and the *Sums or Goods decerned* to belong to the *Arreſter*; but *Arreſtments* upon a *Decreet* (or which is *equivalent*) on a Regiſtrate Band, cannot be looſed at all, except the Decreet be turned into a Libel; that is to ſay, the Lords do only ſuſtain the Decreet as a Libel or Summonds againſt the Defender, or that the *Arreſtment* was laid on after the

* Arreſt. upon a Depend.

* K. Ja. 6. Par. 22. Act 17.

Book III. Decreet was ſuſpended; for in either of theſe Caſes *Arreſtments* may be looſed even upon Decreets.

Arreſtment being but a *perſonal Prohibition* againſt the Defender to pay, it laſts no longer than the life-time of him in whoſe hands the *Arreſtment* is made, except it be renewed againſt his Succeſſors; but it dies not with him in whoſe favours it was raiſed, nor with him for whoſe Debt it was laid on; and if the Debt be not *liquid*, the *Debitor's Repreſentative* muſt be called to the *Liquidation*.

Competition of Arreſtment. In the *competition* amongſt moe *Arreſters*, preference is granted according to the *priority even of Hours*; and the firſt Arreſtment is not preferred, if the *poſterioure Arreſter* get the firſt Decreet, to make the arreſted Goods forth-coming; for *Arreſtment* being only an *inchoated Diligence*, it is compleated by the Sentence to make forth-coming; and yet if the Arreſter did exact Diligence to obtain a Decreet, his raiſing the firſt Purſuit will preſer him. He alſo who arreſts on a *Decreet*, will be preferred to him who arreſts on a *Dependance*; and he who arreſts after the term of Payment, will be preferred to him who arreſts before the term, *cæteris paribus*.

† The

The *King's Penſions* and *gratuitous Aliments* cannot be arreſted, becauſe they are given for a particular and favourable Uſe, and not applicable to the Arreſter. Tit. VI.

Poynding may be likewiſe uſed againſt Moveables by virtue of *Letters of Horning* againſt the *Debitors*, containing *Poynding*, or any other inferiour *Judg*, his *Decreet* or *Precept* *, which is done by a *Meſſenger* after the days of the Charge are *expired* † : the form thereof is, The *Meſſenger* after *poynding* the Goods, *appriſes* them upon the *Ground* where he *apprehends* them, and offers them to the *Debitor* for the *Sum* for which they were *appriſed*; and if he compear not, he *carries them to the Mercat-Croſs of the head Burgh of the Shire*, or other *Juriſdiction* where they are *poynded*, and there he *appriſes them*, and delivers them to the *Party*, who is called the *Poynder*: but if any compear, and offer to *make Faith that the Goods belong to them*, and not to the *Debitor*, then the *Meſſenger* muſt deliver them to that *Party*, elſe he is liable in a *Spulzie*. Poynding.

* K. Ja. 6. Par. 12. Act 10. K. C. 2. Par. 1. Seſſ. 1. Act 29.

† K. C. 2. Par. 1. Seſſ. 1. Act 4.

Poynding is a *judicial Sentence*, and the *Meſſenger is Judg conſtituted by the Letters*; *the Meſſenger writes likewiſe an*

Book III. *Execution of Poynding*, and that *Execution* is better believed than any who offers to prove the *contrare*; for that *Execution* is only quarrelable by *Improbation*.

Arreſtment being but an *inchoated diligence*, diſcharging the *Party* in whoſe hand the *Arreſtment* is made to pay, the *Right* to the *Goods arreſted* remains ſtill in the *Debitor*, and may be *poynded for his Debt*; for *Poynding is a compleat diligence*, giving an abſolute Right to the *Goods poynded*.

Poynding cannot be after the Sun is ſet; for it is a Sentence.

Labouring Oxen. Labouring *Oxen*, or other *Plough Goods* cannot be *poynded* in time of labouring, (leſt labouring ſhould be otherwiſe diſcouraged) except there be no other Moveables upon the Ground to be *poynded**.

* K. Ja. 4. Par. 6. Act 98.

TIT. VII.

Of Preſcriptions.

PRe*ſcription* being a *way of evacuating and annulling both Heritable* and *Moveable Rights*, comes in here after both theſe are explained.

Preſcrip-

Preſcription is defined, an *Acquiſition of Property by the Poſſeſſor's continuing his Poſſeſſion for ſuch time as the Law determines*; Which was introduced not only for puniſhing the *Negligence of the Proprietar*, who owned not his Right for ſo many Years, but likewiſe for ſecuring Poſſeſſors, and ſuch as derived *Right* from them; and leſt by a conſtant uncertainty the Poſſeſſors being unſecure, might neglect the *Improvement of what they poſſeſſed.* Tit. VII. Preſcription.

Heritable Rights, (under which I comprehend *Wadſets*, *Heritable Offices*, *Servitudes*, *Patronages*, *&c.*) and all Actions depending upon them, or relating to them, preſcrive with us in 40 Years; if the *Poſſeſſor* being a *ſingular Succeſſor* have a *Charter*, *Diſpoſition*, or *Precept*, and *Seaſin* in his Perſon; or being an *Heir*, have a conſtant tract of *Seaſins* continuing and ſtanding together for the ſpace of 40 Years, flowing upon *Retours*, or *Precepts of Clare Conſtat*: For the *Law* did not truſt a *Seaſin* alone, it being only the *Aſſertion of a Notar*; but *Reverſions* which are in the Body of the Poſſeſſor's Right, or Reverſions duly *regiſtrated*, preſcrive not. Preſcript. of Heritable Rights. K. J. 6. Par. 22. Act 12.

All

Book III.

Preſcript. of Perſonal Rights.

All *Perſonal Rights* and *Actions* relating to them, preſcrive likewiſe in 40 Years: If a *Document* be not taken upon that Right, that is to ſay, *If nothing be done whereby the true Proprietar declares his Intention to follow and own his Right* *.

* K. Ja. 3. Par. 5. Act 29. Par. 7. Act 55.

In both theſe *Preſcriptions*, the extraordinary length of time ſupplies the want of *bona fides* in the *Poſſeſſor*. But by the Civil Law, *things Sacred, Religious* or *Publick*, could not be preſcrived; nor yet things robbed or ſtoln, there being a *vitium* real which affects all thoſe things; but whether this will hold in our Law, is neither clear by our Statutes nor Deciſions.

Preſcriptions of particular Actions.

Actions of Spulzie and *Ejection*, preſcrive in three Years after committing thereof; as to the *Specialities* of theſe Actions, *viz.* The violent *Profits* and *Oath in litem*: But *Minors* have three Years after their *Majority* *.

* K. Ja. 6. Par. 6. Act 82.

As do alſo Actions for *Servants Fies*, *Houſe-meals*, and *Merchant-compts*; except they can be proven after theſe three *Years* by the *Debitor's Oath* †: And Removings, if Action be not intended without three Years after the warning ‖; and in theſe laſt Preſcriptions Minority is not excepted.

† K. Ja. 6. Par. 6. Act 83.

‖ K. Ja. 6. Par. 6. Act 82.

If

If *Assizers* err in serving a Man wrongously *Heir* to his *Predecessor*, the *Retour* may be quarrelled within 20 Years; but the *Assizers* themselves can only be pursued for *Error* within three Years *, but the Right of *Blood* it self never prescrives: and therefore a Man may be *served Heir to his Father or Grandfather*, after 100 Years, being debarred by no time, *nam jura sanguinis nullo jure civili adimi possunt*: But this is to be understood where there is no Service; for if there be once a Service, though of a wrong Person, it cannot be quarrelled after Twenty Years. Tit. VII. Assizers. * K. J. 6. Par. 22. Act 13.

If a Person who is *forefaulted*, *possessed Lands as Heritable Tenant* for *five Years* before the *Forefaulture*, without interruption, the *King* is obliged to show no Right in the Person of him who was *forefaulted* to the Lands, or others that he possessed; because it's presumed that the Person *forefaulted* would abstract the *Writs*, which *quinquennial Possession* is to be tried by an *Inquest of the Shire where the Land lyes*. And if the *Traitor* was in Possession the time of the *Forefaulture*, though he possessed not five Years before the *Forefaulture*, the *King* or his *Donator* must be continued in Possession for five Years, K. Ja. 6. Par. 9. Act 2.

Book III. Years, that in the mean time the *Traitor's* Tacks and other Rights may be sought out.

Arrestments on *Decreets* and *depending Actions* prescrive within five Years, *viz. Arrestments on depending Actions* five Years after *Sentence*, and on *Decrees* five Years after their date.

Meals and *Duties* due by *Tenants*, *prescrive*, if not pursued within five Years after the *Tenant's* removing. *Ministers Stipends* and *Multures* prescrive, so that they cannot be pursued, after five Years, except they be proven by the *Debitor's Oath*, or by *Writ*.

Holograph Bands, and *Subscriptions* in *Compt Books*, prescrive in twenty Years, except they be proven by the *Debitor's Oath*.

And lastly, all *Bargains* provable by Witnesses, prescrive as to that manner of Probation, if not pursued within five Years after their date; all *Actions on Warnings*, *Spulzies*, *Ejections*, *Arrestments*, *Ministers Stipends*, &c. *prescrive* within ten Years, unless wak'ned every five Years; but this alters not any shorter *Prescriptions* of these *Actions* *.

* K. C. 2. Par. 2. Sess. 1. Act 9.

And for clearing the meaning of the Statute appointing these Prescriptions, by

a

a late Statute, *Anno* 1685, it is ordained that all thoſe Actions mentioned in the ſaid Act 1669, which were intented or depending before the date of the ſaid Act 1685, ſhould preſcrive within five Years thereafter, if they be not wakened within that time; and all Actions to be intented after the ſaid Act ſhould preſcrive within five Years, if they be not wakened within that time. Tit. VII.

All theſe *Preſcriptions* run *de Momento in Momentum*, ſo that the *Preſcription* runs till the laſt moment of the time allowed; but they run only from the time wherein the Debt could have been purſued, ſince till then the *Proprietar* could not be called negligent, which Negligence is the main foundation of *Preſcriptions*: and therefore *Preſcription* runs not againſt a *Band* from the date thereof, but only from the term of Payment: and *Preſcription* of an Action of *Warrandice* runs only from the *Eviction* *, becauſe no Man is liable in *Warrandice*, till the Lands be *evicted*; and from the ſame *Principle* it is, that *Contra non Valentem agere non currit Præſcriptio*; and that *Preſcription* runs not againſt *Minors* in moſt Caſes, in whom Negligence is not puniſhable, ſince it proceeds from no

* K. Ja. 6. Par. 22. Act 12.

Book III. *Design*, but from the *Unripeness* of their *Age*.

Vassals cannot prescrive against their *Superiours*, because the *Vassal's Right* acknowledges the *Superiours*; nor can *Laicks* prescrive a Right to *Teynds*, being incapable of such Rights after the *Lateran Council*; but though the Right it self prescrives in neither of these Cases, yet the by-gones due by *virtue* of these Rights before *Forty Years* may *prescrive*.

Prescription. *Prescription* runs against the *Kirk and Mortifications*: but on the other hand, because *Churchmen are negligent*, and *Rights* may be *lost* in the *change* of *Intrants*; therefore *thirteen Years possession* is sufficient to maintain a *Churchman in possession*; which is called *Decennalis & Triennalis Possessio*, and is a *presumptive Title*, and sufficient till a better be shewn, by which it may be excluded; for *Præsumptio cædit veritati*.

Prescriptions run likewise against the *King*, except as to His *Majesty's annex'd Property*, or to his *un-annex'd Property*; whereof the *Ferms*, *Duties*, or *Feu-ferms*, have been compted for in *Exchequer*, since *August* 1455 Years *.

* K. C. 1. Par. 1. Act 12. Any Deed, whereby the *true Proprietar* owns his Right during the course of the

Pre-

Preſcription, is called *Interruption*; and *Preſcription is interrupted* in *Our Law*, either by a *Proceſs* or a *Charge raiſed within the Years of the Preſcription*; and a Citation on the firſt *Summons interrupts*, tho thereafter paſt from *pro loco & tempore*; but regiſtration of a Writ interrupts not Preſcription: And *Interruption* by *Citation* is not ſufficient, unleſs it be made by *Meſſengers* perſonally, or at the Party's Dwelling-houſe, and that it be renewed every ſeven Years *; and that the *Execution* be ſigned by the *Meſſenger* and *Witneſſes*.

Tit. VII. Interruption.

* K. C. 2. Par. 2. Seſſ. 1. Act 9.

Diligence uſed upon a Writ interrupts, as to all Parties concerned therein, for it hinders the Writ it ſelf to preſcrive: And therefore Diligence againſt any of moe Principals, or againſt any of the *Cautioners*, interrupts *Preſcription*, *quoad* the whole Principals and *Cautioners*; and Interruption as to a part interrupts the *Preſcription* of the whole; ſo that if a Man *arreſt* the Meals and Duties of any part of a *Barrony*, he interrupts *Preſcription* as to the whole *Barrony*.

TIT.

TIT. VIII.

Of Succeſſion in Heritable Rights.

HAving formerly ſhewed how *Rights*, whether *Heritable* or *Moveable*, *Real* or *Perſonal*, are conſtituted, and how they are tranſmitted to ſingular *Succeſſors*: It remains now to conſider how theſe Rights are tranſmitted by Succeſſion, beginning firſt with Succeſſion in Heritage.

Heir. An *Heir*, is he that *ſucceeds univerſally to all that belonged to the Defunct*; and is therefore in conſtruction of Law, *one and the ſame Perſon with the Defunct*.

Though the *Executor* be in effect the Heir in *Moveable Rights*, yet we call thoſe only *properly Heirs who ſucceed in Heritage*; and with us there are ſeveral kinds of Heirs diſtinguiſhed by their ſeveral *Denominations*.

Heir of Line. The firſt and chief kind of *Heirs*, are the *Heirs of Line*; who are ſo called, becauſe they ſucceed *lineally* according to the *Right of Blood*; and they ſucceed thus:

Deſcendants. Firſt, *Deſcendants*, according to the *Proximity of their Degree*, in which the eldeſt

eldeſt Son is preferred to all his Brothers, and all the Brothers to the Siſters; and if there be only Siſters, they ſucceed all equally. Tit. VIII.

The next degree is *Grand-children* and their *Great-grand-children, &c.* who ſucceed all in the ſame way.

If there be no *Deſcendants*, then *Collaterals* ſucceed, in which the firſt degree is *Brothers and Siſters German*, for the *whole Blood excludes the half Blood*, and Brothers the Siſters, and Brothers by the Father's ſide exclude Brothers by the Mother's ſide; there being no Succeſſion with us by the Mother's ſide. Collaterals.

Failing Deſcendants and Brothers and Siſters, whether *German* or *Conſanguinean*, the Succeſſion aſcends firſt to the *Defunct's* own Father, who excludes all his own Brothers and Siſters, the *Defunct's Uncles* and *Aunts*; and failing them, the Father's Brother, (obſerving the ſame Rules formerly mentioned in the ſucceſſion of Brothers and Siſters) and failing the Father's Brothers and Siſters, the Grandfather; and after him his Brothers and Siſters the ſame way; according to the *Propinquity* of Blood, and ſo upwards as long as any *Propinquity* can be proven; all which failing, the *King* ſucceeds as *Ultimus Hæres*.

Right of Repreſentation.

It is to be obſerved, that in *Heritage* there is a *Right of Repreſentation*, whereby the *Deſcendants* exclude ſtill the *Collaterals*, though nearer by many degrees to the Stock, or *Communis Stipes*: And thus the *Great-grand-child* of the eldeſt Son ſecludes the ſecond Brother, becauſe he comes in place of, and ſo repreſents the elder Brother, his *Great-grand-father*.

Heirſhip Moveables.

The *Heir of Line* has Right to the *Heirſhip-moveables*, and excludes all other *Heirs* therein; *Heirſhip-moveables are the beſt of each kind of Moveables*, which are given to the *Heir*, becauſe he is excluded from all other Moveables: if there be *Pairs* or *Dozens*, he gets the beſt *Pair* or *Dozen*; but in others he gets only one ſingle thing. None have Right to *Heirſhip-moveables* but the *Heirs of Prelates*, under which are comprehended all *Beneficed Perſons*; the *Heirs of Barons*, under which are comprehended all who are *inveſt in Lands* or *Annual Rents*, though not erected in a *Barrony*; and the *Heirs of Burgeſſes*, by which are meaned *Actual Trading*, but not *Honorary Burgeſſes*: and if a Man was once a *Baron*, he is ſtill preſumed to continue ſo, except it can be proved that he is deveſted; and that is the ſenſe of the *Brotard*, *Semel Baro ſemper Baro*.

An

An Heir of *Conqueſt*, is he *who ſucceeds to the Defunct in Lands and other Heritable Rights, to which the Defunct did not himſelf ſucceed as Heir to his Predeceſſors*; as for inſtance, what a Father leaves to a ſecond Son is *Conqueſt*, though he got the ſame from his Father, becauſe he was not *alioqui ſucceſſurus*: But if the Father diſpone to his eldeſt Son any part of his Eſtate, this is not *Conqueſt*, but *Præceptio Hæreditatis*; becauſe he was *alioqui ſucceſſurus*: And the *Rule* is, that *Heritage* deſcends, and *Conqueſt* aſcends; ſo that if the middle of three Brothers die, his immediate elder Brother would be his *Heir of Conqueſt*; and if a Son of a *ſecond Marriage* die, leaving *three Brothers of a former Marriage*, the youngeſt would ſucceed in his Conqueſt-Lands; and this I conceive was introduced, for enriching the elder Brothers, whom *Our Law ſtill favours*; whereas *Heritage* muſt deſcend according to the *Law of Nature*. Tit. VIII. Heir of Conqueſt.

Theſe *Heirs of Conqueſt* have Right to all *Lands*, *Annual Rents*, *Heritable Bands*, and others, whereupon *Infeftment* did or might follow, but they have no Right to *Tacks*, *Penſions*, *moveable Heirſhip*, and all other *Rights* having *Tractum futuri temporis*, and requiring no *Infeftment*,

Book III. and so not *competent to Executors*; all which belong to the *Heir of Line*.

Heirs Male. The *Heir Male* is the neareſt *Male* who can ſucceed; and all *Heirs of Line*,

General Heirs. are alſo called *General Heirs*, becauſe they ſucceed by a general Service, and repreſent the *Defunct* univerſally.

Heir of Tailzie. The *Heir of Tailzie*, *is he to whom an Eſtate is tailzied*, ſo called, becauſe the *legal Succeſſion* is cut off in his favours from the *French* word, *tailer*, *to cut*; and the matter of *Tailzies* may be *ſummed* up in theſe *few Concluſions*.

Primo, If a Fiar or Proprietar do only ſubſtitute the Perſons who are to ſucceed one to another, this is called a *Simple Deſtination*; and it may be broke or altered by the Maker, or by the reſpective Members as they ſucceed, even though an Inhibition were ſerved thereon; for there being no Obligation not to alter, there can be no foundation for an Inhibition.

Secundo, If the Maker deſign that his *Tailzie* ſhould not be altered, he either adjects a prohibitory Clauſe *de non alienando*, and then though the Maker may alter it, yet neither the *Inſtitutes* nor *Subſtitutes* can alienate by any voluntar or gratuitous Deed; for elſe that Deed would be reducible on the *Act of Parliament* 1621,

1621, as done in prejudice both of the Maker and of the *remoter Subſtitutes*, who are to ſucceed, and who are *Creditors* by the ſaid prohibitory Clauſe: Or Inhibition may be raiſed upon the ſaid prohibitory Clauſe, after which the *tailzied* Lands cannot be diſponed, even for an *Onerous Cauſe*. Tit. VIII.

Tertio, If the Maker deſign that the *tailzied* Lands ſhould not be alienable, even for *Onerous Cauſes*, then he adjects to the *Pactum de non alienando*, *a Clauſe irritant* & *reſolutive*, declaring all Deeds done contrair to and in prejudice of the *Tailzie* to be null and void, and in that Caſe all poſterior Alienations, even for onerous Cauſes will be reducible; tho no Inhibition be raiſed thereon: And becauſe ſuch Clauſes prejudg Creditors and Commerce very much, and ſeem to be inconſiſtent with the Nature of Property and Dominion; Therefore an * Act of Parliament was neceſſary for ſecuring them: and generally in all theſe Caſes the Contraveener prejudges not only himſelf, but all the *Heirs* that might ſucceed by him, ſo that there is place for the next Subſtitute, who may in either of theſe Caſes ſerve himſelf Heir to the Maker, (though generally a Man ſhould be ſerved Heir to him who was laſt

* K. Ja. 7. Par. 1. Act 22.

Book III. inſeſt) or he may ſerve himſelf Heir to the Contraveener who was laſt inſeft, without being obliged to fulfil his Deeds.

Quarto, If a Man oblige himſelf to *tailzie* his Lands, he is obliged once to *tailzie*, but not to continue the *Tailzie*; but if the Obligation be made for an onerous Cauſe, the ſame is not revokable, as if the *Tailzie* be mutual.

Quinto, Where *Tailzies* are made to two Strangers jointly and their Heirs, they ſucceed to equal halves, and they are both Fiars: But if Lands be taken to a Man and his Wife in Conjunct-fie and Life-rent, and their Heirs, the Husband is Fiar, and the Wife's Conjunct-fie reſolves only in a Life-rent; and yet in Subſtitutions to Moveables, both their Heirs would ſucceed equally.

Sexto, In Conjunct-fies theſe general Rules hold, that the Husband is Fiar, becauſe of the Prerogative of the *Sex*; and that he is Fiar on whom the laſt Termination falls: yet both theſe Rules hold only *preſumptive*, and may be over-ballanced with ſtronger Preſumptions; as for inſtance, if the reverſion of Lands belonging to the Wife as Heretrix be taken to the Husband and Wife, and their Heirs, the Wife's Heirs would exclude the Husband's

 Heirs;

Heirs; for it is presumable that the Reversion should follow the Heritable Right; Or if a Father should take Security in Lands to himself, his Son, and their Heirs, the Father would remain Fiar, which does likewise hold, though the Security were taken to the Father and Son *nominatim*, and the Son's Heirs, even though the Son were infeft; for it is presumable, that the taking Infeftment was only designed to compleat the Security and to substitute the Son, but not to exclude the Father from his own Fie: And generally in all Substitutions, the chief thing to be considered, is the Design of the Parties. Tit. VIII.

Heirs of Provision are these who succeed by virtue of a particular Provision in the Infeftment, such as the Heirs of a second Marriage: And as to these Heirs of Marriages, we may observe two things, First, That if a Father by his Contract of Marriage be obliged to employ a Sum to himself, and the Wife in Conjunct-fie, and the Heirs of the Marriage, he cannot in prejudice thereof do any *fraudulent gratuitous Deed*, though he may provide a Jointure to a second Wife, or Provisions for his Children of a second Marriage. Heirs of Provision.

Secundo, Though a Father may assign or dispone Sums to Children, when ex-

Book III. tant, whereby they will be preferred to poſterior *Creditors*, as becoming *Fiars* by the ſaid Rights; yet if the Father diſpone to Children to be procreate, this will be conſidered only as a Deſtination, and ſo will not hinder the Father to make poſterior Rights, or even poſterior Creditors to affect by Diligences what is ſo diſponed.

Tertio, *Proceſs* will be ſuſtained at the inſtance even of the appearand Heir of the Marriage againſt the Father, to fulfil the ſpecial *Obligations* therein, or to purge any Deeds already done by him in prejudice thereof.

Albeit, where Heirs are not ſpecially deſigned in any Right, the *Heirs of Line* exclude all other Heirs; yet if a Man take Lands to himſelf, and his *Heirs Male tailzie* or proviſion, and thereafter acquire Reverſions, or Tacks of the ſame Lands to himſelf and his Heirs; theſe Rights will accreſs to that ſpecial Heir to whom the Land was provided; for it is not preſumable that a Man would give the Lands to one, and the Rights of them to another Heir.

When Women ſucceed, all theſe of one Degree ſucceed equally; and becauſe the Eſtate is divided amongſt them, they

are

are called *Heirs Portioners*, the Eldeſt not ſecluding the reſt, and having no advantage over them: But where the Rights are indiviſible, ſuch as *Titles*, *Juriſdictions*, *Superiorities*, and all the Caſualities of theſe Superiorities, ſuch as *Ward*, *Marriage*, *Non-entry*, *Feu-duties*, &c. theſe fall all to the Eldeſt *Heir Female* without diviſion, together with the principal Meſſuage, it being a Tower or Fortalice; for other Houſes are divided equally. Tit. VIII. Heirs Portioners.

All theſe Heirs are liable for their Predeceſſor's Debts, *in ſolidum*, if they once enter Heir, except Heirs Portioners, who are only liable *pro rata*; and Heirs *ſubſtitute* in a Sum, who are only liable to Creditors in the value of the Sum to which they are ſubſtitute. But they have in *SCOTLAND* a Privilege which they call the *Benefit of Diſcuſſion*, whereby the Heirs of Line muſt be firſt purſued to *fulfil the Defunct's Deeds*, or *pay his Debts*: And next to theſe, the *Heir of Conqueſt*, the *Heirs Male*, the *Heir of Tailzie*, and *Heirs of Proviſion*. But for fulfilling a Deed relating to particular Lands, the Heir who ſucceeds in theſe particular Lands muſt be firſt purſued without *diſcuſſing*; and that which is meant Benefit of Diſcuſſion.

Book III. meant by *Diſcuſſing*, is, *that the Creditor muſt proceed by Horning, Caption, and Appriſing or Adjudication againſt the Heir*; who is to be *diſcuſſed* before he can reach the other Heirs.

Heir active. An *Heir* is ſaid with us to be *Heir active*, who is ſerved *Heir*, and may *purſue*; whereas he whom the *Law* makes liable to be *Heir*, is ſaid to be *Heir paſſive*: As when the *appearand Heir is infeft* upon a Precept of *Clare Conſtat* by the *Superiour*, or otherwiſe meddles with his *Father's Eſtate*.

Heir paſſive.

When the *Predeceſſor dies*, he who ſhould be *Heir*, (and therefore is called *appearand Heir*) has Year and Day allowed him to deliberate *whether he will be Heir*; which is called *Annus deliberandi* *; and which is indulged by the Law, becauſe if a Man enter once Heir, he is liable to all the Debts though *far exceeding the Eſtate*; and within that Year he cannot be purſued, nor obliged to enter; but after the Year is expired, the *Creditor* may *charge him to enter Heir*; and if he reſolve not to enter, he muſt renounce any *Right* he has by a *Writ under his hand*.

Appearand Heir.

* Annus delib. K. Ja. 6. Par. 23. Act 27.

Poſthume Child. This Year is compted from the *Defunct's death*, except in a *poſthume Child*, who

who has a Year allowed him after his Birth, and not only during this Year, but after it expires, the *appearand Heir* without inſtructing any Title, may purſue for *Exhibition of all Rights made to his Predeceſſors*, and of all Rights made by his *Predeceſſors* to any in his own *Family*, (but not to *Strangers*) to the end he may deliberate whether he will enter *Heir*: the appearand Heir may alſo defend his *Predeceſſor's* Right, and continue his Poſſeſſion by purſuing for *Meals* and *Duties*, though he renounce. *Vid. ſupra Book* 2. *Tit.* 9. §. *Life-rents.* Tit. VIII.

If the *appearand Heir* reſolves to *enter Heir to his Predeceſſor*, he muſt raiſe *Briefs* from the *Chancellary*; which *Brief is a Command from the King* to the *Judg ordinary* where the Lands lie, to cauſe try by an Inqueſt, conſiſting of 15 ſworn Men, whether the *raiſer of the Brief* be *neareſt Heir*; and this is executed or proclaimed at the *Mercat-Croſs* where the Lands lie; and if at the day appointed the *Inqueſt* find him to be the next Perſon who ſhould ſucceed, they *ſerve him Heir*, by a Paper which is called a *Service*, and which being returned by them to the *Chancellary*, there is a *Writ* given to the Heir; and which is called the *Retour*,

Book III. *tour*, becauſe it is their Anſwer and Return to the *Chancellary of the Points* contained in the *Brief*; and thereafter, the Perſon who is ſerved Heir is inſeſt by Precepts out of the *Chancellary*; which Infeftment muſt be given by the *Sheriff* or his *Deputes*, and the *Sheriff-Clerk as Notar* thereto: and if the Service was to any *particular Lands*, it is called a *ſpecial Service*; but if there was no *Land* deſigned, it is only called a *general Service*: and this general Service may be before any Judg, and is ſufficient to eſtabliſh a *Right to Heritable Bands*, *Diſpoſitions*, *Reverſions*, *Juriſdictions*, and all other Rights whereupon the *Defunct* was not inſeft, nor needed to be inſeft; and a ſpecial Service includes a general Service, but not *è contra*.

General Brief. The *general Brief* hath only two *Points or Heads*, viz. if the *Defunct* died at the *King's Peace*, and if the raiſer of the *Brief* be the next Heir; but the *ſpecial Brief* has *ſeven*, viz. when the *Defunct* died. *Secundo*, If he died laſt *veſt* and *ſeiſed* at the *King's Peace*. *Tertio*, That the *Raiſer is next Heir*. *Quarto*, Of whom the Lands are holden *in capite*. *Quinto*, By what manner of holding. *Sexto*, What is their *Old and New extent*, *Septimo*,

Septimo, Whether the *Raiſer be of lawful Age*, and in whoſe hands the Lands are at preſent. Tit. VIII.

Sometimes likewiſe the *Vaſſal* without ſerving himſelf *Heir*, gets a *Precept of Seaſin* from the *Superiour*; wherein becauſe the *Superiour* declares, *That it is known to him that ſuch a Man is Heir to his Father*, it is therefore called, a *Precept* of *Clare Conſtat*; which therefore makes the Obtainer liable *paſſive* to all his *Predeceſſor's Debts*, but gives him only *Right active* to the *particular Lands* contained in the *Precept*; nor will it give him a Right even as to theſe Lands, except againſt thoſe who derive Right from the *Superiour* who gave it.

Bailiffs alſo of *Burghs Royal*, do *infeft* their *Burgeſſes in Burgage Lands* *, by giving them *Seaſin as Heirs*, and delivering them for a *Symbole* the *Heſp* and *Staple of the Doors*; and the *Seaſin in that Caſe* is in place *of a Service*, as to theſe Lands; but is not in other Caſes a ſufficient *active Title*: and theſe *Seaſins* muſt be given by the *Bailiffs* and the *Common Clerk* of the *Burgh* as *Notar*, otherwiſe they are null. * K. J. 6. Par. 1. Act 27.

The *Heir* who is *Retoured*, holds either his Lands of the *King*, and then he gets *Precepts*

Book III. *Precepts out of the Chancellary* to the *Judg Ordinary* to *infeft* him; which if he refuſe, the *Lords* upon a Supplication, will direct *Precepts* to any other Perſon, who is thereby made a *Sheriff in that Part:* but if the Lands hold of another *Superiour*, then either that *Superiour* is himſelf entred or not; if he be entered, he will be charged by *four Conſecutive Precepts* to enter the Heir; and if at laſt he diſobey, his immediate Superiour will be charged, and ſo till the *Heir arrive* at the King, who never refuſes to enter any; and if the *Superiour* be not entered, he muſt be charged upon *forty Days to enter*, that being himſelf entered, he may enter his *Vaſſal*; and if he refuſe or delay, he loſes all the *Non-entries* of his *Vaſſal* during his Life; but no other Caſualities, becauſe *quoad* theſe he was not *culpable*.

Though the Perſon who ſhould be Heir do not enter to his *Predeceſſor's Heritage*, yet he may be made liable to his Predeceſſor's Debt, by two *paſſive Titles* relating to *Heritable Rights*; viz. *Geſtionem pro hærede*, and *as Succeſſor titulo lucrativo poſt contractum debitum*; and there is a third *paſſive Title* relating to Moveables, which is called *Vicious Intromiſſion*.

Behaving

Behaving as Heir, or *Geſtio pro Hærede*, is when the Perſon who might have been *Heir* immixes himſelf, and intromits with either the *Moveable Heirſhip*, or any Heritable Eſtate belonging to the *Defunct*; in which Caſe, he is liable to the Creditors, not only according to the value of what he intromitted with, but as far, and in the ſame manner as if he had been entered *Heir*; and yet the Lords will not ſuſtain this *paſſive Title*, becauſe of its extraordinary hazard where the intromiſſion is very ſmall, or where he has colourable Title, to which he might aſcrive his *intromiſſion* as a *Factory* from the *Compriſer*; or the *Donator* to the *Eſcheat* or *Recognition*, *Geſtio pro Hærede*, being *magis animi quam facti*; which *Factories* will defend though there was no *Declarator*: but if the *appearand Heir* had no *Factory*, it is not ſufficient to alledg the *Defunct* died Rebel, and ſo could have no *Heir*, except his *Eſcheat* was declared before intenting the Purſuer's Action; nor will this *paſſive Title*, nor *vicious Intromiſſion* be ſuſtained beyond *ſimple Reſtitution*, except they be purſued in the *Intromitter's* own life-time, they being kinds of *Delicts*. But he will not be liable if the *Defunct's Right* was reduced, though after his intromiſſion; Tit. VIII. Behaving as Heir.

Book III. intromission; and since this *passive Title* was introduced by the *Lords of Session*, in favours of the *Creditors*, to deter *appearand Heirs* from *fraudulent Intromission*, therefore an *appearand Heir*, paying his Predecessor's Debt, will not infer this *passive Title*, since that is for the Advantage of *Creditors*; nor will the getting of Money for ratifying a *Comprising* that is expired, infer this *passive Title*, since the *Creditors* would have got no Advantage by that Right: but if the *appearand Heir* had consented before the *Comprising* was expired, it would be a *passive Title*, because as *Heir* he might have redeemed the *Comprising*; and if an *appearand Heir* grant Bond to a confident Person for his own behoof, and that confident Person *compriſes* or *adjudges* the Heritage thereupon, his *Intromission* by virtue of that *Appriſing* will not defend him * against this *passive Title*, whether the Legal be expired or not; but he will be liable as if there were no such Right in his Person.

* Act Sederunt, 28 Feb. 1662.

Succeſſ. tit. lucr.

Succeſſor titulo lucrativo, is where the *appearand Heir*, to preclude the neceſſity of entering *Heir*, and so being liable to the *Creditors*, gets a *Diſpoſition* from him to whom he would have been *Heir*, without any *Onerous Cauſe*; the receiving whereof,

whereof, though it be a ſmall part of the Eſtate, makes him liable to the Payment of all the *Creditor's Debt*; if the Right made as well as the *Infeftment* was poſterior to the *Creditor's lawful Debt*. But if there be an *Onerous Cauſe*, then either it is not near equivalent to the value of the *Lands diſponed*, and in that Caſe it will not defend againſt this *paſſive Title*: Or, if it be near to the *value*, it will defend againſt it, but not againſt *Reſtitution* of that *value*. And ſince this *paſſive Title* overtakes ſuch as might have been Heirs; therefore a Diſpoſition granted to a *Grand-child*, will make him *Succeſſor titulo lucrativo*, though the Father be alive, ſince by the *Courſe of Succeſſion*, he might in time have been Heir, though he was not immediate Heir: but ſince this can only reach *appearand Heirs*, therefore a Diſpoſition made by one Brother to another, though the Maker had no Children, will not make him *Succeſſor titulo lucrativo*, ſince the Brother might have had Heirs himſelf; and ſo his Brother was not his *appearand Heir*. Tit. VIII.

This *paſſive Title* holds only in Heritage, and therefore the *getting a Right to moveable Heirſhip and Tacks, will not infer the ſame.*

Geſtio pro Hærede, and *Succeſſor titulo lucrativo*, being *paſſive Titles*, whereby in *odium* of the irregularity of the intromiſſion they are made liable as Heirs; therefore theſe *paſſive Titles* can extend no further than if they intromit with, or take a *Diſpoſition* to theſe things to which they might have ſucceeded, and ſo not inferred againſt an Heir of *Tailzie*, intromitting with, or getting a Diſpoſition of what would have fallen to the Heir of Line; nor can they be extended further than if they had been ſerved Heirs: And thus an Heir-portioner will be no further liable in theſe than *pro rata*, if ſhe had entered; for the Copy ſhould go no further than the Original.

To conclude the Succeſſion in Heritage, it is fit to know, that by an *old Statute* *, and our *conſtant practick*, *a Man cannot diſpone his Heritage upon Death-bed in prejudice of his Heirs*; (that is to ſay, neither Lands, nor Heritable Bands, nor any Band though moveable, in ſo far as his Heritage may be thereupon *appriſed* or *adjudged*, can be then diſponed); ſo jealous was Our Law of the importunity of *Churchmen* and Friends, and of the weakneſs of Mankind under ſuch Diſtempers: And therefore if a

* Stat. Will. Reg. cap. 13. Rights on Death-bed.

a Man has made any Right in prejudice of his *Heir*, after contracting Sickneſs, though he was found enough in his Judgment for the time, and continued found for a very long time; yet this Right will be reduced, as done *in lecto*, or upon *Death-bed*, either at the inſtance of the *appearand Heirs*, or at the inſtance of the *appearand Heirs Creditors*: and it is ſufficient to prove Sickneſs, though it be not proved *Mortal*, and that he was Sick; without proving that he died of that Sickneſs, or was Sick the very time of the Diſpoſition. Tit. VIII.

If thereafter the Maker of ſuch a Right *come to Kirk or Mercat unſupported*, the Law preſumes that the Maker was *reconvaleſced*, and ſo the Deeds *reconvaleſce* with him: But ſince the Law has fix'd upon *Kirk* and *Mercat*, as open Places, where the Diſponer may be ſeen by all Men, and by unſuſpect Witneſſes; *Equivalent Acts*, as going to make Viſits, though at a greater diſtance, will not be ſuſtained. But though a Man cannot grant a new Right upon *Death-bed*, yet he may perfect an old Right, or do a Deed to which he might have been otherwiſe compelled, as for Payment of his Debt, or may grant a rational Jointure

Book III. to his Wife, though he cannot grant Proviſions to his Children in that Condition. And all Deeds done with the conſent of his Heir are valid; becauſe this Law is introduced in favours of Heirs, whether they be *Heirs of Line*, *Male*, or *Tailzie*, or *Proviſion*.

TIT. IX.

Of Succeſſion in Moveables.

THe ſame Rules are obſerved in the *Succeſſion of Moveables*, that were formerly ſpecified in the *Succeſſion of Heritage*, except as to theſe particulars, *viz.* all of one Degree ſucceed equally: and ſo amongſt *Brothers* and *Siſters*, the *Elder ſeclude* not the *Younger*, nor *Males* the *Females*, as in *Heritage*: and in *Moveables* there is no *Right of Repreſentation* as in *Heritage*; and therefore if there be a *Brother* and two *Siſters* alive, and a third *Siſter's Children*, the *Brothers* and *Siſters* who are living will ſucceed equally, excluding the *Children of the Siſter* who is dead.

Teſtaments. *A Teſtament* or *Latter Will*, does require to be in *Writ*, for *Nuncupative Teſtaments*

ſtaments (which were ſo called in the *Civil Law*, becauſe the *Defunct* named his *Heirs* without *Writ*) are not allowed by *Our Law*, by which a *Teſtament* muſt either be *Holograph*, all written with the *Defunct's* own hand; or at leaſt ſubſcriven by him before two Witneſſes, if he can write; or if he cannot write, by a *Notar* or *Miniſter* and two *Witneſſes*. Tit. IX.

No *Heritable Right* can be left in *Teſtaments*, though the *Teſtator* was in *Leidge Pouſtie*, or perfect Health: and though the *Teſtament* be made in other *Nations*, where *Heritage* may be diſponed by *Teſtament*; yet it will not tranſmit a Right to *Heritage* lying in *Scotland*; and yet a *Teſtament* made according to the *Solemnities* of theſe *Nations*, will be valid in *Scotland*; for though they may regulate us as to *Solemnities*, yet they cannot alter the Nature, and ſo not the tranſmiſſion of our *Rights*.

A Legacy is a Donation left by the Defunct in any Writ, to be payed by his Executor: But if the *Legatar* die before the *Teſtator*, or before the Condition is fulfilled on which the *Legacy was left*, then the *Legacy* evaniſheth; and though neither other Mens Moveables, nor a Man's own Heritable Rights can be left in *Legacy*, Legacy.

Book III. *gacy*, yet ſuch *Legacies* are valid, if the *Teſtator* knew that the Sum left was Heritable, or belonged to others; and the *Executor* in thoſe Caſes muſt pay the value.

A *Minor* being above 14 Years, may make a *Teſtament*, without the conſent of his *Curators*; but under 14 Years he can make none. A *Wife* may make a *Teſtament*, without the conſent of her *Husband*. And a Perſon *interdicted*, without the conſent of the *Interdictors*; but *Idiots* nor *furious Perſons* can make none, except in their *lucit intervals*; nor *Baſtards*, except they be *legitimated*, or have Children of their own.

If a Man be *married*, the *Wife* has without *Paction*, *a ſhare in his Moveables*, of which he cannot *defraud her by his Teſtament*; and this is called *Jus Relictæ*: and if there be Children, the Law has provided a Portion of the *Moveables* for them, which is therefore called their *Legitim*, and of which their Father cannot prejudge them by his *Teſtament*, but there is no *Legitim* due by the *Mother's Death*; nor have Children who are *Foris Familiat*, that is to ſay, *who are married, and have renounced their Portion natural*, any *Legitim* due to them.

Jus Relictæ.

Legitim.

This *Legitim* is alſo due only to the

† imme-

immediate Children, but not to *Grand-children.* Tit. IX.

The Remainder of the *Defunct's Moveables*, beſide what is due to the Relict and Children, is called the *Dead's Part*; and upon that only he can diſpone. Dead's part.

If a Man have no *Wife* nor *Bairns*, all is the *Dead's part*, and may be diſponed by him: If there be either *Wife* or *Bairns*, and not both, then the *Defunct's Teſtament* receives a *Bipartite Diviſion*; but if there be both *Wife* and *Bairns*, then it receives a *Tripartite Diviſion.*

By the *Civil Law*, a *Teſtament* was null if the *Heir* was not named; but with us a *Teſtament is Valid* though the *Executor* be not named, who is the *Heir in Mobilibus*, and is called *Executor*, becauſe he *executes and performs the Defunct's Will.* Executor.

By Our *Law*, Relicts and Children dying after their Husbands and Fathers, but before Confirmation of their *Teſtaments*, do tranſmit their intereſt in the *Defunct's Moveables* to their neareſt of *Kin*, *viz.* the Children, their *Legitim* or *Bairns part*, and the Relict her ſhare of the *Moveables*; the *Bairns* alſo, as neareſt of *Kin*, have Right to the whole *Dead's part*, and the *Executor* not being neareſt of *Kin*, muſt count to them therefore, retaining

Book III. only a Third of the *Defunct's part*; which is allowed to him for executing the *Teſtament* *, (if he be *Executor Nominate*, for an *Executor Dative* gets no allowance) and if there be a Legacy left to the *Executor Nominate*, it is imputed in Payment of his Third; but the *Dead's part* whether failing to Children or to the other neareſt of *Kin*, failing Children is not tranſmitted without *Confirmation*; for both the *Relict's part* and *Childrens Legitim* ariſe by the Death of the *Father* or *Husband*, and ſo needs no *Confirmation* or other *Conſtitution*: But the neareſt of *Kin's* Right is by *Succeſſion*, and conſequently requires *Confirmation* for eſtabliſhing it, without which it cannot be tranſmitted to their *Executors*; for as an *Heir* in *Heritage* muſt be entered otherwiſe, he cannot tranſmit his *Right*, ſo neither can an *Executor* without *Confirmation* tranſmit his *Right*; *Confirmation* being the only *Additio Hæreditatis in mobilibus*: and as without *Confirmation* the neareſt of *Kin* could not be liable Paſſive in Payment of the *Defunct's Debts*, ſo neither could he without it have *Right Active*. Children have Right to their *Legitim*, except they be ſecluded therefrom either by their own *Renunciation*, or by accepting

* K. Ja. 6. Par. 22. Act 14.

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a *Provision* in full *Satisfaction* of all that they can crave as their Portion natural, or *Bairn's part* of Gear: And in either of these Cases they are *foris familiat*, and out of the *Family*, and so have no share with the *Bairns* remaining in the *Family*: And therefore if Children get Bonds of Provision from the *Father* in his *Leidge Poustie*, they are not thereby excluded from their *Legitim*: Nor are they oblig'd to collate these Bonds of Provision, and to impute them as a part of their Portion natural; but they have Right to them as *Meer Creditors*, and may likewise seek their *Legitim*: But if these Bonds of Provision were made to them upon *Death-Bed*, they cannot seek both the Provisions of these Bonds and their *Legitim*; for the Father upon *Death-Bed* cannot prejudge the Relict, nor the rest of his Children of their respective shares, and consequently these Children who are so provided upon Death-Bed, must collate with the Relict and rest of the Children *: but the *Heir* has no share in the *Moveables*; except he *collate*, (and *be content that the rest of the Children share equally with him, in all that he can succeed to as Heir*;) or in case there be but one *Child*; for then that *Child* is both *Heir* and *Executor* without *Collation*. An

Tit. IX.

* K. J. 6. Par. 22. Act 17. Collation.

Book III.

Exec. Nominate.

An *Executor Nominate*, *is he who is named by the Defunct in his Teſtament*, and is therefore likewiſe called an *Executor Teſtamentar*; but if there be none named by the *Defunct*, then the *Commiſſar* will make an *Executor Dative*; and ordinarly they prefer the neareſt of *Kin*: but if the neareſt of *Kin* being charged, will not *Confirm*, then they name their own *Procurator-Fiſcal Executor*; and if thereafter the neareſt of *Kin* compear, they uſe to *Surrogate him*, and this is called an *Executor-Surrogate*.

Executor-Creditor.

A *Creditor* may confirm himſelf *Executor-Creditor*, and ſo may purſue the *Defunct's Debitors*; and leſt that *Creditors* ſhould wrong one another by *Nimious Diligence*, *Our Law* has appointed that all who ſhall confirm themſelves *Executors-Creditors*, or ſhall do Diligence againſt *Executors* or *Intromitters* * within ſix Months one of another, ſhall come in *Pari Paſſu*.

Act of Sed. 28 Feb. 1662.

Executors-Creditors are only obliged to confirm as much as may pay themſelves; and are for the ſame reaſon *only liable to do Diligence for what they did confirm*.

Becauſe *Moveables* may be eaſily concealed from *Creditors*, or diſſipated; therefore the *Law* appoints, *that the Executor ſhall*

ſhall upon Oath give up Invertar, and find Caution to make theſe Moveables forthcoming, and then the *Commiſſar* confirms him; nor can he purſue, or diſpone as *Executor*, till he be confirmed: he is only liable for the *Defunct's Debt*, in as far as the Goods confirmed will extend. Tit. IX.

Executory being a meer Office, it accreſces to the *Survivers*; if there be moe *Executors*, and in ſo far as the *Executors* have not execute the *Teſtament* in their own Life-time, that is to ſay, *have not obtained Decreets for the Goods belonging to the Defunct*, there will be Place for a new *Executor*, for executing theſe, and they are called, *Executors quoad non executa*: or if the *Executor* omit to give up any thing in the *Inventar*, or do not give up the ſaids *Moveables* at the *full Rates*, there will be another *Executor-Dative* appointed by the *Commiſſars*, who is called *an Executor Dative ad omiſſa vel male appretiata.*

The *Executor* only has Power of *Adminiſtration*; and the *Creditors* and *Legatars* can only purſue him, except where there is a *Special Legacy left of ſuch a particular thing*, or a Sum owing by ſuch a *particular Perſon*: For then the ſpecial *Legatar* has the *Dominium* tranſmitted to him, Special Legacy.

Book III. him, and ſo he may himſelf purſue for his ſpecial *Legacy*; but the *Executor* muſt be ſtill called in the purſuit, to the end it may be known, *whether the Debts exhauſt the ſpecial Legacies:* For, no *Legacy* can be payed, till the Debts be payed; and therefore, if all the *Legacies* cannot be payed, the *Legatar* ſuffers a *Proportional Defalcation for Payment thereof*; but if there be as much *Free Goods* as will pay the ſpecial *Legacy*, there will be no *Defalcation.*

An *Executor* cannot diſpone till he obtain a *Sentence*, but even the Sentence ſtates him not in the *abſolute Right of the Moveables*, otherwiſe than that he may *diſcharge* and *aſſign* to the *reſpective Perſons* having intereſt: For, if he were *denounced Rebel*, the *Executory Goods* even after Sentence, would not fall under his *Eſcheat*, nor would his *Executors*, or his *Creditors* have Right thereto, in prejudice of the neareſt of *Kin* of the *Defunct*, to whom he was *Executor.*

Co-Executors. If there be moe *Executors*, whom we call *Co-Executors*; one cannot purſue without the reſt, *for all of them repreſent* the *Defunct* only as one Perſon; but if any of the reſt will not *concur*, they may be *excluded from their Office*, by a *Proceſs* before

before the *Commiſſars*; nor can an *Executor* for the ſame reaſon *diſcharge a Debt* wholly, ſince the reſt have an equal ſhare in each *Debt*: but if the other *Executors* have got as much as their *ſhare* will extend to, a *Diſcharge* even from one of the *Executors* will be ſufficient: nor are (for the ſame reaſon) *Co-Executors* liable for the *whole Debt*, and ſo cannot be *ſingly purſued*, unleſs they have *intromitted* with as much as may pay the Debt purſued for. Tit. IX.

An *Executor* is liable to do Diligence for recovering the *Debts* due to the *Defunct*, and the Diligence required upon his part, is a *Sentence*, and *regiſtrated Horning againſt the Defunct's Debitors*; but if there be an Univerſal or Special *Legatar*, whereby the *Executor confirmed* has no Advantage, then the *Executor* is not liable in Diligence, but only to *aſſign* the *Creditors* that they themſelves may purſue. Diligence of Executors.

The *Executor* likewiſe cannot pay any *Debt* without *Sentence*, leſt otherwiſe he might *prefer one Creditor to another*; but yet the *Executor* may pay thoſe *Debts* that are acknowledged in *Teſtament* without *Proceſs*, providing the ſame be payed before the *Creditors intent a purſuit*: but

theſe

Book III. these which we call *Privileged Debts*, may be payed at any time even after *Proceſs* is intented at the inſtance of other *Creditors*; becauſe they are preferred to all others, *viz. Servants Fies, Medicaments on Death-Bed, Houſe-meal, and Funeral-expences.*

Privileged Debts.

After the *Executors* have executed the whole *Teſtament*, they may get a *Decreet of Exoneration* before the *Commiſſars* againſt the *Creditors*, and all having Intereſt; wherein they may prove that all they got is *exhauſted by Lawful Sentences*; but it is not neceſſar to have ſuch a *Decreet* when they are purſued before the *Lords*, for it is ſufficient when they are purſued there, to alledg, *that they are exhauſted by way of Exception.*

Decreet of Exoneration.

If any Perſon intromit with the *Defunct's* Moveables without being confirmed, they are liable to the *Defunct's* whole *Debts*, whether they were related to him or no, though their Intromiſſion was very ſmall; and this was introduced to prevent the *fraudulent* and *clandeſtine abſtracting of the Defunct's Moveables, without Inventary, in prejudice of Creditors:* and therefore this Paſſive Title is only introduced in favours of *Creditors*, but of none others, ſuch as *Legatars Bairns*,

Vitious Intromiſſion.

Bairns, &c. But if the Intromitter con- Tit. IX.
firm before any Action be intented, this purges the *Vitious Intromiſſion*, and the Intromitter is only liable for the *value of the Goods intromitted with*; or if there be an *Executor confirmed*, no Perſon can be purſued as *Vitious Intromitter*; for the Intromitter then is only liable to the *Executor:* But the *Relict*, or the *Defunct's Children*, confirming within Year and Day after the *Defunct's* Death, do thereby purge the Vitioſity, though they confirm not till after Citation; nor will neceſſar Intromiſſion infer Vitioſity: and that is called *neceſſar Intromiſſion*, when either the *Husband* or the *Wife* continue their Poſſeſſion of one another's Goods after one another's Deceaſe for preſervation; and that becauſe there is no other Perſon to look after them; and this is for the *advantage of the Creditors*, ſince it hinders the Goods from periſhing.

If there be moe *vitious Intromitters*, they are each liable *in ſolidum*, if they be purſued in ſeveral *Actions*; and *pro virili*, if they be purſued together; but none of them get *Relief*, *for wrong in our Law has no Warrant.*

The *Heir* is obliged to relieve the *Executor* of all Heritable Debts, and Relief, *&c.* the

the *Executor* is bound to relieve the *Heir* of all Moveable Debts, as far as the *Inventar* will reach.

TIT. X.

Of last Heirs and Bastards.

Ultimus Hæres.

WHilst there is any alive who can *prove even the remotest Contingency of Blood to the Defunct*, they succeed to him; but if there be none, the *King* succeeds as last Heir; for *quod nullius est, est Domini Regis*; and so the *King* succeeds to the *Defunct* as last Heir, both in Heritage and Moveables, and is preferred to all *Superiours* and others whatsoever; for which end he makes a *Donatar*, who must obtain a *Declarator before the Lords of Session*, against all who are supposed to have any *Relation*: whereupon a *Decreet* being obtained *before the Lords*, declaring *that the King has Right as last Heir*, the *Defunct* having died without any Relation, this *Decreet* is equivalent to a Service; but if Lands be taken by a Man to himself, and his *Heirs Male* simply, the *King* or other *Superiour* will succeed as last *Heir*, if there

there be no *Heirs Male*, though there be *Heirs Female*, ſince the Land was not provided to them; and therefore Men ordinarily in their *Tailzies adject* the Clauſe *which failzing* to their *Heirs whatſomever*. Tit. X.

Becauſe the *King* ſucceeds here as Heir, therefore he is liable to pay the Defunct's Debts; but he is only liable as far as the Eſtate will extend; and therefore the *Creditors* may adjudge the Real Eſtate, and ſerve themſelves *Executors-Creditors* in the *Moveables*.

A *Baſtard* by Our *Law*, has neither *Heirs* nor *Executors*; but yet he may diſpone upon either his *Heritage or Moveables* in his *Leige Pouſtie* though he cannot make a *Teſtament*, except he be *legitimated* by a Letter under the *Great Seal*, (which extends not to Heritage) or have Children ſurviving him; for the *Baſtard's* Children will always ſeclude the *King*. Baſtardy.

The *King* in the Caſe of *Baſtardy*, makes a *Donator*, who purſues Declarator, and is liable to the Debt; for in effect the *King* ſucceeds here, *quaſi ultimus hæres*, and *Creditors* uſe the ſame Execution in this Caſe, as in the other: and in both *ultimus hæres* and

Book III. *Baſtardy*, the Relict has ſtill her ſhare of the *Moveables*, as in other Caſes.

Children procreated betwixt Perſons divorced, and theſe with whom they have committed *Adultery*, cannot ſucceed to them *.

* K. Ja. 6. Par. 16. Act 20.

THE

THE INSTITUTIONS Of the LAW of SCOTLAND.

BOOK IV.

TITLE I.

Of Actions.

HAving finiſhed theſe two firſt Parts of the *Law*, which treat of *Perſons and Rights*: We come now to treat of the *Third Part*, viz. *Actions*, whereby theſe *Perſons* purſue thoſe *Rights*. Actions.

An *Action* is defined to be a *Right of proſecuting in Judgment what is due to us*: Defin. of Actions.

Book IV.

Real and Personal Actions.

And it suffers very many Divisions; the first whereof is, that some are Real, and some Personal: *A Personal Action*, is *that whereby we only can pursue the Person that is obliged to us*; as where I pursue a Man for Payment of a Sum due by his Bond. *A Real Action, is that whereby a Man pursues his Right against all singular Successors, as well as the Person who was first obliged:* As for instance, if one have an *Infeftment of Annual Rent*, he cannot only pursue the *Granter* for Payment of the Money by a *Personal Action*, but he can by a *Real Action*, called *an Action for Poynding of the Ground*, pursue all singular Successors, and poynd the Tenants and Intromittors with the Rent, for recovering of his Annual Rent out of the Land that stood affected with his *Infeftment of Annual Rent*. But by the Civil Law, a Personal Action is said to be that which arises *from a Personal Obligement*, as a Real Action is *that which arises from a Real Right*, and is founded *in Dominium or Property*, and competent against any Possessor or Detainer of what is ours, called likewise *rei vindicatio*.

Actions are also divided in ordinary Actions, and Actions recissory: For with us all Actions are called ordinary Actions, except

except Improbations, whereby we purſue *Papers to be declared Falſe and Forged*; *or Reductions, whereby we purſue Rights to be declared null, and to be reduced.* Tit. I. Improbation and Reduction.

In *Improbations* there are two Terms given to produce the Writ, becauſe the danger is great: And if the Writer and Witneſſes of and in that Writ be alive, *their Teſtimonies are only allowed as Probation*; which is called *the direct manner of Improbations:* But if theſe be dead, the *Lords* try the Verity of the *Writ by ſtrong Preſumptions and Conjectures*, which is called *the indirect manner of Improbation:* But becauſe in Reductions the Writ called for, is only to be declared null till it be produced; therefore in theſe there is only *one term granted for producing.* Terms of Improbation. Direct manner of Improbation. Indirect manner of Improbation.

No Certification will be granted againſt any Writs made by the Purſuer and his Predeceſſors and Authors, except he be ſerved Heir to theſe Predeceſſors, and produce a Right made by theſe Authors: But *Certification* will be granted againſt any Rights made to the Defenders or their Predeceſſors, to whom they may ſucceed *jure ſanguinis*, or to their Authors, or to any to whom theſe Authors may ſucceed *jure ſanguinis*; if any Perſon be called to *repreſent theſe Authors.* Certification in Improbation.

Book IV. The ordinary *Reductions* are *ex capite Inhibitionis, Whereby we purſue Rights to be declared null as granted after Inhibition is raiſed by us*; or *ex capite interdictionis*, if granted after *Interdiction* is raiſed by us; or *ex capite viris & metus*, if the Rights were extorted from us by force; or *ex capite fraudis*, if the Right were *elicit from us by Circumvention*, in both which laſt the Purſuer muſt libel the *Qualifications or Circumſtances* from which the Force or Fraud are inferred; or *ex capite lecti*, if the Deeds were done upon Death-bed, in prejudice of an appearand Heir; or upon the *Act of Parliament* 1621 *, if the Deeds were done in *prejudice of prior lawful Creditors, in favours of conjunct or confident Perſons*; that is to ſay, *Relations or Truſtees, without an onerous Cauſe*; or *to a Creditor* though for an *onerous Cauſe*, in prejudice of another who had done prior Diligence, that was habile to affect the Subject diſponed: all which, and many others of that Nature, are oppoſed to ordinary Actions; becauſe they are extraordinary Remedies invented by Law for the preſervation of Mens Rights, and are called extraordinary, becauſe they are never competent, till other *ordinary Remedies fail.*

* K. J. 6. Par. 23. Act 18.

* Actions

Actions *of Reprobatour* and *Errour* are in effect *Reductions*, and muſt have the concourſe of the *King's Advocate*: In the firſt whereof, a Party againſt whom Witneſſes *have deponed unjuſtly*, craves the Decreet *pronounced upon theſe Depoſitions to be reduced*, becauſe the Witneſſes have deponed falſly, *circa initialia teſtimoniorum*; and condeſcends in his *Reaſons of Reduction* upon the particulars wherein they have deponed falſly; and alſo concludes, *that the Teſtimonies ſhould be reprobated.* Tit. I. Reprobatour.

In the Summons of Errour, the Purſuer craves that a Service *(whereby the Defender is ſerved Heir to ſuch a Man)* ought to be reduced; becauſe the Purſuer is a nearer Relation to the Defunct than the Perſon wrongouſly ſerved, upon which he condeſcends; and therefore concludes, *that the Service and all following thereupon may be reduced*; and that it may be *found that the Inqueſt who ſerved him Heir have erred:* and this is the only Summons that is drawn in *Latin* with us. Summons of Errour.

Some Actions are called *Preparatory* or *Prejudicial Actions*, becauſe *they muſt be diſcuſſed before other Actions are competent*; As for inſtance, If I purſue for a Sum, and the Defender raiſes an Improbation, Actions prejudicial.

Book IV. bation, alledging the Writ to be falſe, the tryal of the Falſhood muſt be firſt diſcuſſed, and ſo is prejudicial to the *Action of Payment*.

Exhibitions. *Exhibitions* conclude either meerly to exhibit the Writ, or the thing called for; and then it is only a *Preparatory Action*, ſuch as *Exhibitions ad deliberandum*; or elſe they conclude Delivery: and in all *Exhibitions* the ordinar terms libelled, are that the *Defender had, has, or has fraudfully put away the Papers or Things craved to be exhibited*; and therefore he is not obliged to exhibit, except he had them ſince the Citation, or fraudfully put them away, to elude a *future Citation*.

Actiones bonæ fidei. Some Actions are called *Actiones bonæ fidei*, in which Equity is followed, as *Actions upon Mandates, Depoſitations, Emption, Location, &c.* In which the Judg conſiders what in Equity is to be done by one Party to another. And

Actiones ſtricti Juris. ſome Actions are *ſtricti juris*, in which the Judg is to follow the ſtrict Preſcript of the *Contract* upon which the Action is raiſed, as in a *Declarator of Redemption*, wherein the *Purſuer craves, that it may be declared that he has lawfully redeemed the Lands* that were wadſetted; in which Caſe, the Judg muſt conſider the very preciſe

preciſe terms of Reverſion, and that the Lands were redeemed conform to theſe terms; nor is *Equipollency relevant* in theſe Caſes. Tit. I.

Some Actions are called *Rei perſecutoriæ*, by which we purſue that *quod patrimonio noſtro abeſt*; which is commonly called *Damage and Intereſt*. Rei perſecutoriæ.

Some are called *Penal Actions*, becauſe *we purſue not only for Repetion and real Damage, but for extraordinary Damages, and Reparation by way of Penalty*; ſuch as are *Spulzies, Actions for violent Profits*, &c. Penal.

Some Actions are called *Arbitrary Actions, wherein the Judg is tied to no particular Law, but proceeds ex nobili officio*; that is to ſay, according to what he ſees juſtly and fit; as an Action for proving of the Tenor of an Evident, wherein the Complainer libels, that he had ſuch a Paper, (of which he muſt libel the *full tenor verbatim*) *and that he loſt it by ſuch an Accident*; *and therefore concludes, that the tenor may be proven by Witneſſes, and Adminicles in Writ*, which he muſt libel; for no Tenor can be proven without ſome Adminicles in Writ: And generally, there being many things with which the Law behooved to Arbitrary.

truſt the Diſcretion and Honeſty of the Judg, ſince all Caſes could not be comprehended under known Laws; it therefore inveſted the Judg with this eminent Power, which is called *nobile officium*, in oppoſition to that *officium ordinarium, & mercenarium*; wherein he is obliged to follow the *Will of the Contracters* preciſely: *& hoc officium mercenarium Judex nunquam impertit niſi rogatus.*

Declarators.

Some Actions are called *Declarators*, becauſe the Purſuer concludes in them that ſome ſpecial thing ſhould be declared in his Favours; and ordinarly where-ever the *King*, or any other *Superiour* grants a Gift, he to whom it is granted purſues a Declarator, *craving, it may be found and declared, that the Caſuality gifted to him has faln in the Superiour's hands, and that he has Right thereto by virtue of the Gift*: And thus Declarators muſt be raiſed upon *Eſcheats*, *Marriages*, *Non-entries*, &c. only there needs no *Declarator upon a Gift* of Ward and of Forefaulture when paſt in *Parliament*; but if the Forefaulture be paſt before the Juſtices, the Gift muſt be declared. And on Gifts of *Eſcheat* they ſometimes raiſe Actions both of general and ſpecial Declarator in one Summons. In the general, the Purſuer

ſuer concludes, that it ſhould be found and declared that the *Rebel was lawfully denounced to the Horn*; and that thereby his Eſcheat fell in the *Superiour's* hands: And in the ſpecial, he concludes, *that the Tenants of the Rebels* Lands, whoſe Eſcheat is faln, may pay him the Meals and Duties by *virtue of his Gift, and Decreet of general Declarator.* But though this laſt Action be called *an Action of ſpecial Declarator*, it is in effect but an *Action of Meals and Duties.* In other Caſes alſo, where any thing is craved to be found and declared as a Right ariſing upon a ſpecial Matter of Fact, for which no other Action can be found that has a ſpecial Name: *Lawyers* do now cauſe raiſe *Actions of Declarator*, or at leaſt cauſe adject Concluſions of Declarator to other Actions, ſuch as *Reductions*, &c. and theſe are the ſame with the *Actiones in factum*, mentioned in the *Civil Law.*

Some Actions are called *Civil, wherein Men proſecute their Civil Rights*; and ſome *Criminal, wherein Men proſecute Crimes, ad vindictam publicam.* Civil Actions.

For farther clearing of Actions, and how they ought to be libelled; I ſhall ſhortly

Book IV. ſhortly explain the *Nature of a Summons*, and ſhall ſet down ſome of thoſe Actions which have ſpecial Names and Concluſions.

Nature of a Summons.

The chief Parts of a Summons are the Purſuers Intereſt or Title; that is to ſay, *the Right ſtanding in his Perſon*, whereby he has good Intereſt to purſue the Action he has intented.

Secundo, That all the Perſons who ſhould be called as *Defenders*, be called in the Summons; and ſince it is a relevant Exception againſt a Summons, that *all Perſons having Intereſt are not called:* Therefore it follows clearly, that for the more Security it is fit to call all Perſons who may be concerned in that Proceſs.

Medium concludendi.

Tertio, The *medium concludendi*; that is to ſay, *the Ground whereupon the Perſons called are liable to pay and perform what is craved.*

Quarto, After all this is narrated, the King in the Summons ſays, *Our will is*, &c. that ye *cite ſuch and ſuch Perſons*, &c. which is called *the Will of the Summons*, and which Will of the Summons does comprehend a Command to the *Meſſenger* to cite the *Defenders*; and expreſſes the number of Days, upon which they

Will of the Summons.

are

are to be cited, and the Places to which they are to be cited, and before whom they ſhould compear: *As alſo* the *Concluſion* craved by the Purſuer, each of which Summons almoſt has its own ſpecial *Stile* and *Terms*; and by Act of Parliament *Writers* are commanded not to alter the *Ancient Stile* *. Tit. I. Concluſion. * K. J. 6. Par. 10. Act 13.

It is obſervable, that though the *Matter of Fact* be ordinarily narrated before the Will of the Summons; yet *Summonſes of Reduction, Improbation, Spulzie,* and *Declarators of Nonentry,* begin at *Our Will is,* &c. and then go on to the Intereſt of the Purſuer, *&c.*

In a *Summons* of *Tranſumpt*, the Purſuer (who in the Summons is always called the *Complainer*) libels, *that he has Right to the Lands whereof he craves the Papers to be tranſumed*; and that therefore it is neceſſar to him to have Doubles, and Tranſumpts of the Rights; and this is the Purſuer's *Intereſt*; and that the *Defender* has theſe Rights, or is obliged to procure him *Tranſumpts:* and therefore concludes, that the Defender ſhould be obliged to *exhibit and produce them,* to be *judicially tranſumed*; and the *authentick Tranſumpts to be declared as ſufficient for the Security of the Purſuer* Tranſumpts.

in

Book IV. *in the ſaids Lands*, as the *original Writs* themſelves.

Multiple Poynding. In a *Summons of Multiple Poynding*, the Complainer having narrated that he is *troubled by ſuch and ſuch Perſons*, who do each of them pretend Right to a Sum in which he is liable; he therefore concludes againſt all of them, to *compear* to *hear* and *ſee the ſame tryed*; and the *Party* who *ſhall be found to have beſt Right* to be preferred, and the other Party to be *diſcharged from troubling and moleſting him in all time coming.*

In a *Summons of transferring*, the Purſuer libels that there was a depending Proceſs, at the inſtance of his Predeceſſor, whom he repreſents againſt the Defunct, whom the Debitor repreſents; which Proceſs muſt be narrated *verbatim:* And if the Purſuer's Predeceſſor be dead, craves that the Proceſs be transferred *Active* in his Perſon, as repreſenting the Defunct. And when the Defender is dead, the ſame is transferred againſt his Repreſentatives *Paſſive.* The Concluſion of Tranſferrences are, that ſuch *Actions* may be competent to the Purſuer as Heir to the Defunct, againſt the Repreſentatives of the Defender, as was competent to the Purſuer's Predeceſſor; and that the ſaid Action may

go

go on and be continued in the ſame manner as it would have done againſt the Defunct, whom the Defender repreſents. Tit. I.

Transferrences are privileged Actions coming in upon ſix Days.

If any Perſon Subſcriver of a Bond or a Contract be dead, the *Procuratory* conſenting to the Regiſtration expires; and therefore the Writ cannot be regiſtrated, otherwiſe than by raiſing a Summons of Regiſtration againſt the Repreſentatives of the Granter, upon the Paſſive Titles, in which the whole Tenor of the Writ craved to be regiſtrated is ſet down *verbatim*; and then it is concluded, that the ſaid Writ ſhould *be inſert* and regiſtrated in the Books of Council and Seſſion for Conſervation; and that Execution ſhould be direct thereupon, in manner mentioned in the ſaid Writ; and that the ſaid Repreſentatives ſhould be liable in Payment: but this Action is ordinarily ſupplied by an ordinary Action for Payment. Summons of Regiſtration.

In a *Summons of Prævento*, the Complainer narrates, that he having *raiſed Letters of Horning*, the ſame were *ſuſpended upon moſt frivolous Reaſons, to a very long day*; and therefore concludes, that the *Defender ſhould bring with him the ſaid Suſpenſion, the blank day of blank*, prævento

Book IV. prævento termino, *to hear and ſee the ſame called, reaſoned and diſcuſſed; with Certification that if he fail, the Lords will cauſe call the Suſpenſion upon a Copy, and admit Proteſtation therein, and ordain the Letters to be put in farther execution.*

Prævento.

If an *Advocation* be raiſed to too long a Day *of compearance*, there may be likewiſe a *Summons of Prævento* raiſed thereof.

Contrav. of Laborrows.

In a *Summons of Contravention of Laborrows*, the Purſuer libels, that *A. B. became Surety* and *Laborrows* for *C. D.* that the Complainers *Wife, Bairns, Men, Tenants, and Servants, ſhould be harmleſs and skaithleſs in their Bodies and Lands*, &c. And then ſubſumes upon the prejudice done, notwithſtanding of the ſaid Caution: And therefore concludes, that both the *Principal and Cautioner* ſhould be decerned to have contravened the ſaid *Act of Caution*, in manner foreſaid; and therethrough that they *conjunctly and ſeverally have incurred the foreſaid Pain, the one half to the King and his Theſaurer, and the other half to the Complainer as Party grieved**.

* K. Ja. 6. Par. 6. Act 77. Par. 13. Act 170. Par. 7. Act 117.

In a *Declarator of Property*, the Complainer narrates his Right to the Lands, and how long and after what manner he and

and his Authors have been by themſelves, their Tenants, and others having Right from them, in the peaceable poſſeſſion of the ſaids Lands, until of late that he is moleſted and troubled by the Defender; and therefore concludes that it ſhould be found and declared, that he has the ſole Good, and undoubted Right and Intereſt in and to the ſaids Lands; and that therefore the ſaid Defender and his *Tenants, and Servants and others, of their cauſing and commanding, ſhould be decerned not to trouble nor moleſt them for the future, in their peaceable Poſſeſſion, bruiking, and joyſing thereof.* Tit. I. Declar. of Property.

If the Complainer deſigns only to maintain his Poſſeſſion, without bringing his Property in Controverſy, he raiſes a *Summons of Moleſtation:* In which he only concludes, that *they ſhould deſiſt, and ceaſe from troubling and moleſting him in the peaceable Poſſeſſion of his Lands.* Summons of Moleſtation.

In a Summons *for Poynding the Ground,* the Purſuer narrates, that he ſtands infeft, and ſeaſed in an Annual Rent of to be uplifted, out of the Lands of and therefore concludes againſt the Tenants of theſe Lands; and the Heritor for his Intereſt, to *hear and ſee Letters directed to Meſſengers at Arms, Sheriff in* Poynding of the Ground.

Book IV. *that Part, to Fence, Arreſt, Appriſe, Compel, Poynd, and Diſtrinzie the readieſt Goods and Gear that are preſently upon the Lands, and yearly and termly in time coming, during the not Redemption of the Annual Rent.*

Spulzie. In a Summons of *Spulzie*, the *King* commands *Meſſengers*, &c. (which is the ſtile of all Summonſes) which begin with *Our Will* is, to *Summon, Warn*, and *Charge* the Defender, to compear and anſwer at the inſtance of the Purſuer, againſt whom the *Spulzie* after ſpecified was committed; that is to ſay, the *Defenders for their Wrongous, Violent, and Maſterful coming by themſelves and their Servants, Complices, and others in their Name; of their cauſing, ſending, hounding out, command, reſet, aſſiſtance and ratihabition to the Lands of upon the day of and for their Wrongous, Violent, and Maſterful Spoilziation of the Goods* (to be condeſcended on) and then concludes, *that they ſhould pay the Prices extending to and the Profits that the Complainer might have made of the ſaids Goods daily ſince the ſaid Spulziation, extending to &c.*

Wakening. In a Summons of *Wakening*, the Complainer after narrating that he had raiſed ſuch

ſuch a Summons, which he had ſuffered to lie over and ſleep for a Year, (for there needs no *Wakening* if there was any *Judicial Act*, or Minute upon the Summons within the Year) and therefore concludes againſt all the Perſons cited in the firſt Summons, to hear and ſee the *foreſaid Action called, wakened, and begun, where it laſt left, inſiſted into, and Juſtice adminiſtrated therein, till the final deciſion of the Cauſe.* Tit. I.

A *Furthcoming* is that Action, wherein the Arreſter libels, that he having raiſed *Letters of Arreſtment*, he cauſed *Meſſenger* lawfully ſence and arreſt all Debts owing by the *Defender* to his Debitor, to remain under Arreſtment, and to be made furthcoming to him; and therefore concludes, that the *Defender* ſhould be *decerned to make furthcoming Payment, and delivery to the ſaid Complainer, of the Sum of adebted, reſtand, owand by him to the ſaid Debitor.* Furthcoming.

If notwithſtanding of the *Arreſtment*, the Debitor pay his own Creditor; he will be liable to the Arreſter, and will be forced to pay him what he was reſting to his own Creditor, and likewiſe he may be purſued *for breaking of Arreſtment*, wherein after the Arreſtment and Breaking of Arreſtment.

Book IV. Payment is narrated, the Purſuer concludes, *that the Defender ſhould be decerned to have broken the Arreſtment then ſtanding, and not lawfully and duely looſed*; *and therefore to be puniſhed in his Perſon and Goods, conform to the Laws of the Realm, in example of others**.

* K. J. 6. Par. 7. Act 118.

Accumulation of Actions.

Though the *Accumulation of ſeveral Actions into one Libel*, was not allowed by the *Civil Law*, yet it is allowed by Ours; in which we may not only purſue ſeveral Perſons for ſeveral Debts in one Libel, which we call by a general name, *an Action againſt Debitors*, but we may likewiſe accumulate ſeveral Concluſions againſt one and the ſame Perſon, though they be of different Natures; as Reductions, Improbations, and Declarators of Property, and Actions of General and Special Declarator; in all which, it is a general Rule, *quot articuli tot libelli.*

But when many Actions are competent for one and the ſame thing, as if a Meſſenger be deforced, we may purſue the Deforcer criminally, (which will infer *Confiſcation of Moveables) or civilly, for payment of our Debt*; and the purſuing of the one does not extinguiſh, or conſum the other; and either the Criminal or Civil Action may be firſt purſued, and

and in the concourſe of all Actions, if the Actions which concur have different Concluſions, as in the foreſaid inſtance where the Criminal Action of Deforcement concludes Confiſcation, and the Civil Action only Payment. Though the Defender be aſſolzied in the Criminal Proceſs, yet he may be purſued Civilly, and the Deforcement referred to his Oath. Tit. II. Concurſus actionum. Deforcement.

TIT. II.

Of Probation.

FOr underſtanding the *Matter of Probation*, it is fit to know, that all *Probation* is either by Writ, by Oath, or by Witneſſes. Probation.

Probation by Writ, has been formerly explained in the Title concerning *Obligations by Writ*. By Writ.

Probation by Oath, is when either the Party or Judg *refers any thing to the Oath of the contrare Party*; *but regularly*, no Man's Right can be taken away by Oath, except he who has the Right refer the ſame to the Adverſary's Oath: but when there is a former Probation already addu- By Oath.

Book IV. ced, the Judg ſometimes gives an *Oath of Supplement*; which is ſo called, becauſe it is given to *ſupply the Probation* already led, when it is defective or unclear.

Oath of Supplement.

Oath of Calumny.

An Oath of Calumny, is that whereby either the Purſuer or Defender is obliged to ſwear that the *Purſuit*, *Defence*, *Reply*, &c. are not *groundleſs* and unjuſt: and this may be craved by either Party at any time during the Dependence; and if it be refuſed, the Purſuer will have no further Action, nor the Defender will not be allowed *to inſiſt any further in the Defence*, *Duply*, &c. whereon his *Oath of Calumny* is craved.

K. Ja. 1. Par. 9. Act 125.

Oath in Litem.

An *Oath in Litem*, *is that which Law allows the Judg to defer to him who is injured*; *for proving the quantities of the thing wherein he is injured*; *V. G.* If I purſue *Titius* for having *broke up my Trunk*, and I having proved *that he did break it up*, the Judg will refer to my Oath what I had in the Trunk; and this is allowed both *in Odium* of him who commits the *Injury*, and leſt the Perſon *unjuſtly injured* ſhould loſe his Right for want of *Probation*.

A qualified Oath.

A *qualified Oath* is, *that whereby he to whoſe Oath any thing is referred*, *depones*, *not ſimply*, *but circumſtantially*; which we call

call *to depone with a quality*; *V. G.* If I pursue *Titius* for payment of 100 *lib.* which *he promised to pay, who compears* and *depones*, *That* the Promise was conditional, and did depend upon something to be done or performed by the Pursuer, as that intuitue of the Promise, the Pursuer was to make over some Right to him, or discharge some Obligation or Right standing in his Person: and those qualified Oaths generally are admitted if the Quality be intrinsick; that is to say, *necessarly imployed in the nature of the thing, or are a part of the Promise:* As in the foresaid Instances. Tit. II.

But if the Quality be extrinsick, it in effect resolves in a Defence, and so must be proven otherways than *by the qualified Oath*; as if a *Debt be referred to a Party's Oath*, who depones, *that he acknowledges the Debt, but that the Pursuer is resting to the Deponent the equivalent Sum with which he would compense the Sum pursued for:* this will not be admitted as a Quality, but is in effect a *Defence* which must be proven *otherways than by his Oath.*

Probations by Witnesses, having been allowed in all *Cases of old*, until the falseness of Men forced our Law-givers to allow nothing above 100 *lib.* to be proven Probation by Witnesses.

Book IV. without Writ or Oath, and Promiſes to be only proven by Oath; this Probation by Witneſs is therefore called *Probatio prout de jure*; and it is fit to know, that none within Degrees *defendant*, that is to ſay, who are *Couſin-germans*, or *nearer Relations*, can be Witneſſes; nor *Women*, nor *Tenants who have not Tacks*, nor *Perſons declared Infamous*, nor *Domeſtick Servants*, nor ſuch as *may gain or loſe by the Cauſe*, nor ſuch as *have given partial Counſel*, that is to ſay, *Advice to raiſe or carry on the Purſuit*; nor ſuch as *have told what they will depone*, which we call *prodere teſtimonium*; nor ſuch as *compear to depone without being cited*, whom the Law calls *Teſtes ultronios*, and rejects them *becauſe of their ſuſpected forwardneſs*: All others except theſe may depone, and are called *habile Witneſſes*; and if *habile Witneſſes* refuſe to come when they are cited, there will be firſt *Horning*, and then *Caption directed againſt them*, which are called firſt and ſecond Diligences, but their *Eſcheats* will not fall upon that Horning.

Inhabile Witneſſes.

Preſumptions. *Preſumptions* are a kind of Probation, and a *Preſumption is defined to be a ſtrong Ground or Argument, whereby a Judg has reaſon to think, or be convinced that ſuch a thing is true*; and they are divided into *Præſum-*

Præſumptiones juris, which though they be ſtrong, yet may be taken off by a contrary Probation; as if a Man threaten to poiſon another, if the Perſon was thereafter poiſoned, it is preſumable that he was poiſoned by the Threatner: and *Præſumptiones juris & de jure, ubi lex conſtituit ſuper Præſumpto*; and thus the Law preſumes, that an *ultronious* Witneſs, who offers himſelf, is *partial*, and therefore ſtatutes upon that Preſumption, that he ſhall not be received; *and againſt theſe Preſumptions, no Probation can be admitted.* Tit. III.

TIT. III.

Of Sentences, and their Execution.

After a *Decreet* is extracted, the *Obtainer thereof raiſes Letters of Horning thereon*; whereby the Party decerned is charged to pay or fulfil the will of the *Decreet*, under the pain of Rebellion; and this Decreet can only be quarrelled by *Reduction* or *Suſpenſion*, in both which the Reaſons whereupon it is quarrelled are ſet down: nor can a *Decreet of the Lords* be taken away without Reduction: and

Book IV. and if there has been a Debate in the firſt Inſtance, (for ſo we call the Action before the Decreet, as we call *Reduction* and *Suſpenſion* the ſecond Inſtance) then nothing that was competent to have been proponed before the Decreet will be admitted, but will be repelled as *competent and omitted*; for elſe there ſhould be no end of *Debate*: but yet if any thing have newly emerged, or has newly come to the Party's knowledg, theſe are and muſt be received, if he depone that *he knew not the ſame formerly.*

Suſpenſion. The ordinar effect of a *Suſpenſion, is to ſtop the Execution of Sentences for a time*; and it is a *Summons*, wherein the Party alledged, injured by a Decreet, doth cite the Party who has obtained the Decreet *before the Lords*, (for no *inferiour Court can ſuſpend*) to anſwer to the Reaſons offered by him, for ſuſpending Executions upon that *Decreet*: which Summons proceeds upon a Bill, wherein the *Reaſons* are *repreſented to the Lords*; for though ſometimes *the Lords ordain the Reaſons to be debated upon the Bill*, yet ordinarly they ordain Letters of Suſpenſion to be raiſed: If the Decreets be *in foro*, then the Suſpenſion muſt paſs by the whole Lords in time of *Seſſion*, and by three Lords in

† time

time of *Vacance*; but other Decreets may be ſuſpended by any one Lord. Tit. III.

There are other Reaſons allowed to be inſiſted on beſide theſe in the Bill, and theſe are called *eiked Reaſons*; and a Man may ſuſpend upon new Reaſons, as oft as he pleaſes, for competent and omitted is not received againſt *Suſpenſion*. But if the Reaſon of Suſpenſion be founded on Compenſation, the ſame muſt be proponed in the firſt Inſtance, and before the Decreet be extracted *, otherwiſe it will be repelled as competent and omitted. * K. J. 6. Par. 12. Act 141.

If the *Suſpenſion* be called Diſcuſs'd, and the Letters found orderly proceeded, that is, ordained to be put to farther Execution: Then Letters of Caption may be raiſed; whereby all the *Inferiour Judges* and *Magiſtrates*, are ordained *to concur with the Meſſenger in apprehending the Rebel, and putting him in Priſon:* which if they refuſe, or if the Priſoner thereafter eſcape out of their Priſon, *they are liable to pay the Debt*, by a *Subſidiary Action*.

Decreets are executed likewiſe by *Poynding* and *Arreſtment*, upon the *Warrand in the Letters of Horning*, which are fully treated in their proper places: *Vide ſupra, Tit. Poynding*, and *Arreſtment. Tit. 6. Book* 3.

As

Book IV. As to *Execution of immoveable Goods*, which is by *Compriſing* and *Adjudication*; the ſame is formerly treated, *Book* 2. *Tit.* 12.

If the Decreet be to *remove from Lands*, then the Party decerned to remove, being denounced Rebel, for not removing, the *Sheriff* or *Judg ordinar*, is charged to eject, *who comes to the Land, and puts out the Fire*, or *caſts out ſome of the Pleniſhing*: But if a Man continue to poſſeſs *in ſpite of all Law* after he is legally ejected, the *Privy Council* will give *Letters of Fire and Sword to the Party injured*; commiſſionating the *Sheriff* and others whom he will name, to *diſpoſſeſs him by the Sword, to raiſe Fire, and uſe all other Severities*; for which the Commiſſion does *indemnify them*.

Letters of Ejection.

Letters of Fire and Sword.

If ſuch as have *debateable Rights*, chooſe rather an *Amicable*, than a *Judicial Deciſion*, they ſubſcrive a *Submiſſion to Arbiters*, and if they pleaſe, to an Overſman, and another *Blank* on the back of the *Submiſſion*; wherein they may fill in their *Decreet Arbitral*: And though it be free to theſe *Arbiters* to accept, yet if they once accept, the *Lords will grant Letters of Horning to force them to decide*.

Decreets Arbitral.

Though

Though these *Arbiters* are not tied to the strict *Solemnities of Law*, yet they must observe *material Justice*; and therefore they must *advertise Parties, that they may give in Claims*, (for a *Claim* to *Arbiters* is in place of *Libels to Judges*) and must allow Terms to prove: And though Equity is to them a Rule, as Law is to other Judges; yet if either Party be enormly lesed, the Lords will suspend and reduce their Decreets. If the Submission bear no special Day betwixt, and which they are tied to decide, they must decide within a Year of the Submission; and if Witnesses will not voluntarly appear before them, the *Lords* will upon a Bill grant Letters of Horning to force them to appear, as they will against the Arbiters themselves; if they refuse or delay to decide, and to give forth their Decreet Arbitral. Tit. III.

Another ordinary way now used is, that the one Party grants a blank Band, and the other a blank Discharge, to be filled up by the Arbiters, without any Submission.

TIT.

TIT. IV.

Of Crimes.

Crimes. CRIMES are either Private, where the Injury is committed againſt *Private Perſons*; or Publick, where it is committed immediately againſt the *Commonwealth*.

Delicta. *Private Crimes*, called alſo *Delicta* in the *Civil-Law*, oblige the Committers to repair the Damage and Intereſt of the private Party.

Crimes are in *Scotland* either puniſhed Capitally, by Death; or Pecunially, by a certain Fine; or Arbitrarly, at the Diſcretion of the Judg.

Capital Crimes are,

Treaſon. *Treaſon*, which is puniſhed by *Forefaulture of Life, Lands, and Goods.*

* K. J. 2. Par. 6. Act 24. K. C. 2. Par. 1. Seſſ. 2. Act 12. † K. C. 2. Par. 3. Act 2. *It is Treaſon in any Man to plot, contrive or intend Death or Deſtruction to the King's Majeſty; or to lay any Reſtraint upon his Royal Perſon; or to deprive, depoſe or ſuſpend him* *; *or to endeavour the Alteration or Diverſion of the Succeſſion* †; *to levy War againſt the King,*

King, or any Commiſſionated by him; or to intice others to invade him *; *to make Treaties or Leagues with Foreign Princes, or amongſt themſelves without his conſent* †. *To riſe in fear of War againſt the King; to raiſe a Frey in his Hoaſt* ‖; *to aſſail Caſtles where he reſides* *; *to impugn the Authority of the three Eſtates; to decline the King's Authority, not to come out to the King's Hoaſt*, or to deſert it †; to maintain or reſet *Traitors* ‖; to conceal *Treaſon; to counterfeit the King's Coin*; and to raiſe *wilful Fire* *; all which are *Species of High Treaſon.*

We have a kind of *Treaſon* in *Scotland* which we call † *Statutory Treaſon*, becauſe it is meerly introduced by *Statute*, and not by *Common-Law*; *viz. Theft in landed Men* ‖, becauſe of the Danger of that kind of *Theft*; *Murder under truſt* *; as if one Man ſhould kill another, when he invites him to his Houſe; or a *Tutor* ſhould kill his *Pupil*, which becauſe of the eaſineſs and attrociouſneſs of the Crime is made Treaſon. *The firing of Coal Heughs* †, *Aſſaſſination* ‖, *and the purſuing another for Treaſon without*

* Par. 1. Seſſ. 2. Act 2.
† K. C. 2. Par. 1. Seſſ. 1. Act 3, & 5.
‖ K. J. 2. Par. 12. Act 54. K. J. 2. Par. 6. Act 24.
* K. J. 6. Par. 8. Act 129, and 130.
† K. Ja. 1. Par. 1. Act 4. K. Ja. 2. Par. 6. Act 24. K. J. 2. Par. 2. Act 28.
‖ Act 97. Par. 7.
* K. Ja. 5. Par. 3. Act 8.
† Stat. Treaſon.
‖ K. Ja. 6. Par. 11. Act 50. * Ibid. Act 51. † K. Ja. 6. Par. 12. Act 146. ‖ K. C. 2. Par. 3. Act 13.

Book IV. *out being able to prove it* *. *All Jeſuits, Seminary-Prieſts, and Trafficking Papiſts* †; *and all Thieves, who take Bonds from leal and honeſt Men*; for re-entering when they pleaſe: All who purchaſe *Benefices at Rome*, are guilty of *Treaſon* ‖.

* K. Ja. 6. Par. 11. Act 49.
† K. J. 6. Par. 12. Act 120.
‖ K. J. 5. Par. 7. Act 125.

No Crime can be purſued againſt a Man or his Heirs after his Death; except that *Treaſon* which is committed againſt the *King's Perſon* or *Common-wealth*.

K. J. 6. Par. 6. Act 69.

A *Traitor* being forefaulted, not only all the Lands he holds of the *King*, but all the Lands he holds of any other Superiour fall to the *King*; becauſe the Crime is committed againſt him. But becauſe the *King* cannot hold Lands of any other Superiour: therefore he does by a Letter of Preſentation under the *Quarter Seal*, preſent a Donatar to the Superiour, who is to be Vaſſal to the Superiour, in place of the Perſon forefaulted: And this method of Preſentation the *King* uſes alſo in the Caſes of Baſtardy and *ultimus hæres*.

Not only the Lands diſponed to the Perſon forefaulted, but all the Lands diſponed to Sub-vaſſals, who are not confirmed, fall to the *King*; for the Lands return to the *King* in the ſame condition they

they were disponed by his Majesty, or his Predecessors, without being burdened with any Right except these to which he has consented: Nor is the *King* obliged to acknowledg Tacks, though made and clothed with Possession before committing of the Crime, except the Tack be set for a suitable Tack-duty. The *King* is obliged to pay no Debt, though contracted for onerous Causes, before the committing of the Crime, except the Creditor have a real Security, therefore confirmed before the Crime was committed. Tit. IV.

The other *Capital Crimes* are *Blasphemy*, *Man-slaughter*, *or Homicide*; for all *Homicide is Capital with us*, except it be *Casual* *, or *Homicide* in *Self-defence*. * K. C. 2. Par. 1. Sess. 1. Act 22.

† *Theft* is punishable by Death; but we call small *Theft Pickery*, and it is only punishable *arbitrarly* ‖. † K. J. 1. Par. 13. Act 137, & 14. ‖ K. J. 3. Par. 7. Act 60.

Notour Adultery, that is to say, where there are Children of the Marriage, or where the Adulterers converse openly at Bed and Board, or being discharged by the Church to converse, do continue to converse, is punishable by Death *; *but simple Adultery is only punishable arbitrarly. Incest* *, *Buggery, Duels* †, *the invading of any of His Majesty's Officers, for doing His* * Q. M. Par. 9. Act 74. K. Ja. 6. Par. 6. Acts 105. † K Ja. 6. Par. 1. Act 14.

Book IV. *Majeſty's Service* *; *Forgery* †, *Witchcraft, and the Conſulters of Witches* ‖;

* K. Ja. 6. Par. 16. Act 12. *Sorners*, that is to ſay, *ſuch as maſterfully take Meat and Drink from the King's People without Payment* *: *All wilful*

† K. Ja. 6. Par. 16. Act 4. *hearers of Maſs* †, *and Concealers of the ſame*; *Mutilation* ‖, which is the *diſabling of a Member*, though *de praxi*;

‖ K. Ja. 5. Par. 6. Act 8. this be ordinarly puniſhed with an *Arbitrary Puniſhment*: Or the Authors of

* Q. Mary Act 22. Par. 7. *Infamous Libels, Seditious Speeches tending to Sedition*; *the Strikers of any*

† Q. Mary Par. 9. Act 73. *Judg in Judgment*; *Mixers of Wine* *, *and Committers of Hame-ſucken, by which*

‖ K. J. 1. Par. 1. Act 5, & 7. *we underſtand the aſſaulting or beating any Man in his Houſe.*

The *Crimes* to be *pecunially puniſhed*,

* K. J. 3. Par. 10. Act 71. are the *Slayers of Red-Fiſh* †, *Killers of*

† K. J. 6. Par. 14. Act 193. *Daes, Deer, Roes* ‖; *Deſtroyers of Bee-hives, Fruit-trees, Green-Wood*; *Kindlers of Mure-burn*, except in the Month of *March*; *Steeping of green Lint in*

‖ K. J. 6. Par. 6. Act 76. *running Waters, or Loches*; ſuch as are guilty of *Abominable Oaths*, and *Fornication.*

* K. J. 3. Par. 12. Act 89.

† K. J. 1. Par. 1. Act 19. ‖ K. J. 1. Par. 1. Act 1. and Act 16. Par. 14. Act 10.

Crimes

Tit. IV.

Crimes to be arbitrarly puniſhed at the Diſcretion of the Judg, are Negligence in the *King's Judges and Officers* *, *and ſuch as unjuſtly murmur againſt them* †; *breakers of the King's Protection* ‖; *the bringing home of Erroneous Books* *; *and the troublers of Church-Men*; *Crafts-Men who wrongouſly refuſe to fulfil the Work which they have taken in hand* †; *Verbal Injuries and Scandals againſt private Parties.*

* K. J. 2. Par. 14. Act 76.
† K. J. 5. Par. 7. Act 104.
‖ K. Ja. 1. Par. 11. Act 134.
* K. J. 6. Par. 7. Act 106.
† K. J. 1. Par. 5. Act 80.

It is fit to know that no Puniſhment left Arbitrary by the Law to the Diſcretion of the Judg, can be by him extended to Death; and that where-ever the Law appoints Death to be inflicted, the Offender's Moveables fall to the King, tho the Law does not expreſs the ſame, and tho the Sentence expreſs not the Confiſcation.

K. J. 5. Par. 7. Act 111.

There are other *Crimes* whereof the Puniſhment is not reducible to any of theſe kinds; and thus *Perjury* and *Bigamy*, (which is a kind of Perjury, becauſe a Man who *marries two Wives breaks his Matrimonial Oath*) are puniſhable by *Confiſcation* * *of all the Offenders Moveable Goods*, *Impriſonment*, *and Infamy.*

* Q. Mary Par. 5. Act 19.

Deforcers of Meſſengers, and *breakers of Arreſtment*, are puniſhable by Confi-

Book IV. cation of all their Moveables *; *Fore-*
Forestallers of Mercats †, by buying things be-
* K. J. 6. Par. 7. Act 118. Par. 12. Act 150. fore they be presented to the Mercat, or before the Mercat be proclaimed, are punishable by Imprisonment, and Confiscation of what is bought.

† Ibid. Act 48. || K. J. 6. Par. 11. Act 52. Par. 14. Act 222. Par. 15. Act 257. *Ocker*, or *Usury* ||, which is the taking more than the Annual Rent allowed, or the taking Annual Rent before the term of Payment, is punished by loss of the principal Sum; for the Debitor is to be free from the Obligation, and the Writ being *reduced*, *the Sum belongs to His Majesty*.

* K. Ja. 5. Par. 7. Act 15. K. J. 6. Par. 12. Act 141. *Stellionat*, or the making of double Rights, is punished by Infamy *, and their Persons are at the King's Will.

† K. J. 2. Par. 6. Act 22. K. J. 6. Par. 6. Act 93. The *Keepers of Victual to a Dearth* are punishable, as † *Ockerers*; and by the *Civil Law*, *per leg. Jul. de Annona.* Bribing of Judges is punishable by Infamy and Deprivation. *Plagium*, or the *stealing of Men*, is a particular Crime by the *Civil Law*; but is a Species of Theft with us.

|| K. J. 6. Par. 13. Act 137. And *Thefboot*, which is the saving a Thief by syning with him, is punishable as *Theft* ||. *Baratry*, or the obtaining

* K. Ja. 6. Par. 1. Act 2. Par. 6. Act 72. Benefices from *Rome*, is punishable by * Banishment and Infamy. *Ambitus*, or the obtaining Offices by unjust Means, is not punishable under Monarchy. By

By our Law, when the Purſuer raiſes a *Criminal Summons*, he muſt find Caution to report the *Criminal Letters indors'd* and *execute*; and the Cautioner muſt either enact himſelf in the Books of *Adjournal*, (for ſo we call the Regiſters of the *Juſtitiary*) if he be preſent; or he muſt ſend a Band to be regiſtrate there, if he be abſent, under the Pains contained in the Act of Parliament *: And the Defender is by the Letters commanded to find Caution in the ſaids Books, within ſix Days after the ſaids Letters are execute againſt him; which finding of Caution, he muſt intimate to the Meſſenger who cites him, elſe that Meſſenger may denounce him for not finding Caution. Tit. IV.

* K. Ja. 5. Par. 4. Act 34.

The Defender in all Crimes is allowed to have *Letters of Exculpation*, for leading Witneſſes for proving of his own Innocency, which he muſt raiſe and execute againſt the Day of Compearance, to which he himſelf is cited; for all Diets in Criminal Courts are peremptor. And there are no Diets allowed for farther Probation, either to Purſuer or Defender.

All Probation in Criminal Cauſes muſt be very convincing and clear, becauſe of the ſeverity of the Concluſion: But yet ſometimes Witneſſes otherwiſe *inhabile*,

Book IV. are allowed, becauſe of the Danger of the Common-Wealth, as in Treaſon, or becauſe the Crime cannot be otherwiſe proven, as in *Hameſucken.*

The Juſtices are the only Judges to all Points of Relevancies, and even to the Objections againſt the Witneſſes; and they remit to an *Inqueſt* of 15 choſen Men out of 47, to judg what is proven: And this *Inqueſt* may condemn upon their own Knowledg, they being in our Law both Judges and Witneſſes: And if they condemn, *Their Verdict* (for ſo their Sentence is called) cannot be quarrelled, nor they for Condemning; but if they abſolve after clear Probation led, they may be puniſhed with Infamy, and Confiſcation of Moveables.

The Puniſhment of *Crimes* is taken off either by *Remiſſion*, which muſt paſs the *Great Seal*, and muſt expreſs the greateſt * K. Ja. 4. Par. 6. Act 62. Crime *, for which the *Remiſſion* is granted; or, by *Indemnities*, which is a *general Remiſſion* granted by the *King* or *Parliament*; betwixt which two there is * K. J. 2. Par. 14. Act. 4. K. J. 5. Par. 3. Act 7. this difference, that the obtaining a *Remiſſion* does not free the Obtainer from * *aſſything the Party*, (that is to ſay, *from repairing his Loſſes*) *ſince it's preſumed the King does only diſcharge what belonged*

to

to him, which is *Vindicta Publica*; but not what is the intereſt of *private Parties*, or *vindicta Privata*: But becauſe all the People are repreſented in Parliament, the King and Parliament may by their *Indemnity* diſcharge both the one and the other. Tit. IV.

He who founds on a *Remiſſion*, acknowledges the Crime; but he who founds on an *Indemnity*, does not.

The King likewiſe reſtores Men ſometimes againſt *Forefaultures*; which *Reſtitution* is either by way of *Juſtice*, *finding that the Perſon was unjuſtly condemned*, and then the Perſon condemned is reſtored to all that ever he had; and he recovers not only his Fame, but his Eſtate, though tranſmitted to third Parties *. Or, *Secundo*, the *Reſtitution is by way of Grace and meer Favour*; and then the Party condemned cannot recover what was beſtowed by the King upon third Parties; for the King cannot recal what was once legally and warrantably granted to him.

* K. J. 6. Par. 18. Act 4.

FINIS.

An Explanation of the moſt difficult Scots Words in the foregoing Treatiſe.

A

Accreſs,	Accrue.
Acted in Books,	Enrolled or Regiſtred.
Addebted,	Owing,
Adminicles,	Proofs or Supporters.
Advert,	Take heed.
Advocate,	Counſellor at Law.
Aliment,	Maintenance.
To Aliment,	To maintain, or diet.
Annual Rent,	Intereſt.
Appearand,	Apparent.
Appriſing,	The adjudging of an Eſtate to pay Debts.
Aſcrive,	Aſcribe.
Aſſoilzed,	Acquitted.
Avail,	Value.

B

Backband,	Counterband.
Baillie,	Bailiff.
Bairns,	Children.
Bairns part of Gear,	A Child's Portion.
Band,	Bond.
Bloodwits,	Drawing of Blood in Quarrels.

Boll,	Four Bushels.
Bruik,	Enjoy.
Bursers,	Poor Scholars.
Bygone,	Bypast.

C

Caption,	A Writ for taking a Man.
Casualities,	Rights or Perquisites due to those of whom Lands are held.
Caution,	Security.
Cautioner,	Bondsman.
Cedent,	He that makes a Grant.
Chamberlain,	Stewart.
Chamberlain-Court,	Stewart's Court.
Chancellary,	Chancery.
Coalheugh,	Coal-mine.
Cognition,	Cognizance.
Cognosce upon,	Take Cognizance of.
College of Justice,	Inns of Court.
Colluſion,	Underhand Agreement.
Commiſſar,	Official, or he who holds Bishops Courts.
Compears,	Appears.
Conductor,	Hirer.
Conqueſt,	Purchas'd.
Conſignatar,	A Consigner, he that consigns.
Crop,	Corn.

Daes,

D

Daes,	Does.
Decerned,	Decreed, or Impower'd.
Declarator,	A sort of Declaration in Law.
Decreet,	Decree or Sentence.
Deforce,	To oblige one to desist by force.
Defunct,	Deceas'd.
Denuded,	Divested.
Deputes,	Deputies.
Desuetude,	Disuse.
Diet,	Time of appearance before a Court.
Diligence,	Putting of a Legal Sentence in Execution.
Disconsigne,	Separated.
Dispon'd,	Assign'd.
Distrinzie,	Distress.
Divot,	Green Turf for covering Houses.
Dole,	Deceit.
Donatar,	Donor.
Doted,	Endowed.

E

Effeiring,	Conform or proportionable.
Eike,	An Addition.
Eliciter,	Sollicitor or Procurer.
Emption,	Buying.
Enormly,	Irregularly, Exceedingly.
Escheat,	Forfeiture.

Evict,

Evict,	Affect or deſtroy.
Evidents,	Evidences.
Evite,	Avoid.
Excambion,	Exchange of one thing for another.
Exerce,	Exerciſe.

F

F *Ailzing*,	Failing.
Fang,	Taken in the Fact.
Feal,	Green Turf for Hedging or Incloſures.
Fear of War,	Warlike Poſture.
To Fence a Court,	To hold a Court in the uſual Formalities as in the King's Name, *&c.*
Ferme,	Corn or Meal paid to the Landlord for Rent.
Fisk,	Exchequer.
Foggage,	Graſs which grows after the mowing of Hay.
Forefaulture,	Forfeiture.
Fortilace,	A ſmall Fort.
Frey,	Falſe Alarm or Tumult.

G

G *Leibe*,	Land belonging to the Miniſter of each Pariſh.
Goods,	Cattle.

H

H *Abile*,	Able.
Heritable,	Hereditary.

Heretor,

Heretor,	Freeholder.
Heretrix,	Heireſs.
Heritage,	Inheritance.
Hoaſt,	Army.
Horning,	Outlawry.
Hounding out,	Setting on.

I

Diot,	Fool.
Impreſtable,	Not to be performed.
Infeft,	Having a legal Right.
Intented,	Formed.
Interdiction,	A diveſting one of his Power.
Intromettors,	Thoſe who intermeddle.
Intromiſſion,	Intermeddling.
Intuitue,	With regard or reſpect to.
Joyſing,	Enjoying.
Juſtice General.	Lord Chief Juſtice.

K

Kenned,	Known.
Kill'd,	The drying of Corn on a Kiln.

L

Laborrows,	A binding to the Peace.
Les'd,	Injur'd.
Leal,	Honeſt.
Legatar,	Legatee.
Libel,	Indite or Indictment.
He Libels,	He informs or ſays.
Life-rent,	An Annuity for Life.
Lint,	Flax.

Liquid,

Liquid,	Fix'd, aſcertain'd.
Loches,	Lakes.
Lords of Seſſion,	Judges.

M

Malverſation,	Misbehaviour.
Manſe,	Miniſter's Houſe.
Meal,	Rent.
Modefied,	Regulated, aſcertained.
Moor,	Heath.
Multur,	Toll paid for grinding to the Millar.
Mureburn,	Burning of Heath.

N

Nimious,	Too much.
Notar,	Notary.
Notor,	Known.

O

Onerous,	Weighty.
Owand,	Owing.

P

Peremptor,	Peremptory, fix'd.
Pleniſhing,	Houſhold Furniture.
Poynding,	Diſtraining or Seizing.
Preſcrive,	Preſcribe.
Procedour,	Procedure, Proceſs, or Trial at Law.
Proceſs,	Law-ſuit.
Propone,	Propoſe.
Pupils.	Minors.

Rata,

R

Rata,	A Proportion.
Recognoſce to a Superiour,	Return to a Superiour.
Regality,	Royalty.
Relaxation,	Releaſing or acquitting.
Relevancies,	Sufficiency ſatisfactory.
Relevant,	Sufficient.
Relict,	Widow.
Repledg,	Replevy.
Repone,	Reſtore.
Reprobate,	Reject or Condemn.
Reſile,	Retract or go back from.
Reſtand,	Reſting.
Rouped,	Sold by way of Auction.
Rowming,	Aſſigning of a place for Cattel to feed on.

S

Seſſion,	Term.
Signet,	King's Seal.
Skaithleſs,	Free from Damage.
Sowm,	A Horſe or Cow's Graſs.
Spendthrift,	An Ill Husband, a Prodigal.
Spuylie,	Waſte or Devaſtation.
Stipend,	Benefice.
Subſcrive,	Subſcribe or Sign.
Summar,	Short, or without the uſual form of Law.
Summonſes,	Summons.
Three Suns,	Three Days.

Tabled,

T

Tabled,	Laid before.
Taciturnity,	Silence.
Tacks,	Leaſes.
Tacksman,	Leſſee.
Tailzie,	Entail.
Teand Bear,	Tithe Barley.
Teinds,	Tithes.
Teſtament,	Will.
Theaſurer,	Treaſurer.
Theſaurary,	Treaſury.
Thirl,	To be obliged to grind at ſuch or ſuch a Mill.
Thirlage,	Such an Obligation.
Thole,	Endure.
Tocher,	Wife's Portion.
Tranſumpts,	Tranſcripts.
Tutor,	Guardian.

V

Vaiks,	Is Vacant.
Vaſſal,	One who holds Land from a Superiour in Feu, or on condition of ſuch and ſuch Services.
Vendition,	Selling.
Victual,	Corn, Meal, and Malt.
Uplift,	Collect.

W

Adſet, Wedſet,	Mortgage.
Wrongous,	Wrongful.

FINIS.